Must Courts Respect Hidden Legislative Bargains?

by BRENDAN SELBY*

Introduction

In 2015, the Affordable Care Act ("ACA"), otherwise known as "Obamacare," faced its second big test in the Supreme Court. The issue before the Court was whether the text of the Act allowed the IRS to give tax-credit subsidies for insurance coverage purchased on a health insurance exchange established by the federal government. *King v. Burwell*[1] was a momentous case for public policy, but it is also important for the practice of statutory interpretation. Perhaps no case better illustrates the resurgence of a particularly strong form of textualism—called "new textualism"—that has been brewing in courts and law reviews for the past several decades.

One of the arguments raised by the IRS was that the challengers' reading of the statute "would render several other provisions of the [Act] absurd," and would so seriously undermine the purposes of the Act, that it was at least ambiguous as to whether Congress intended this reading.[2] Responding to this argument, the D.C. Circuit relied on a principle that lies at the heart of new textualist thinking. The D.C. Circuit wrote: "The Constitution assigns the legislative power to Congress, and Congress alone, *see* U.S. Const. art. I, Sec 1, and *legislating often entails compromises that courts* must *respect*."[3] The D.C. Circuit stated that, even where circumstances suggest a drafting error, the court should leave it to Congress to fix the error, unless the plain text crosses a "high threshold of unreasonableness."[4]

Six justices on the Supreme Court rejected the D.C. Circuit's approach and held that the "structure and context" of the ACA evinced the intent to subsidize the purchase of insurance on exchanges set up by the federal

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1. King v. Burwell, 135 S. Ct. 2480 (2015)
2. Halbig v. Burwell, 758 F.3d 390, 399 (D.C. Cir. 2014).
3. *Id.* at 402 (emphasis added).
4. *Id.* (internal quotation marks omitted).

government on a state's behalf. The majority opinion, authored by Chief Justice Roberts, relied heavily on the idea that the Court should not severely undermine a central purpose of the ACA based on plain text reading that was likely not intended by those who passed the law. Three justices, however, concluded that the statute's language was so clear that no alternative reading was even plausible. Their position was supported by numerous scholars who invoked the D.C. Circuit's argument about legislative bargains.[5]

There was no direct evidence of a legislative compromise on the specific question of subsidy eligibility; no evidence that even a single lawmaker intended to leave consumers who used federally established exchanges ineligible. To the contrary, according to *The New York Times*, "interviews with more than two dozen Democrats and Republicans involved in writing the law" showed that the disputed provisions were likely the product of a drafting error.[6] The interviews provided no evidence for the speculative compromise imagined by the D.C. Circuit.[7]

The only evidence of compromise on the issue teed up in *King* came from the literal words of the Act itself. According to new textualism, the very oddness of a strict plain text[8] reading of the statute may be evidence of a potential compromise. This is not a novel or controversial idea. What is new to new textualism, however, is that proponents view the oddness of the plain text as a *sufficient* reason to adhere to a more literal interpretation. New textualists have adopted a "presumption of compromise" where the language of a statute creates results that are odd, incongruous, or downright "goofy."[9] The presumption applies even when there is no corroborating evidence of compromise; the mere possibility is enough to trigger the

5. *See, e.g.*, Brief of Amici Curiae Administrative & Constitutional Law Professors in Support of Petitioners at 17–19, 39, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114); Brief of Jonathan H. Adler and Michael F. Cannon as Amici Curiae In Support of Petitioners at 4, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114).

6. Robert Pear, *Four Words That Imperil Health Care Law Were All a Mistake, Writers Now Say*, N.Y. TIMES, (May 25, 2015), http://www.nytimes.com/2015/05/26/us/politics/contested-words-in-affordable-care-act-may-have-been-left-by-mistake.html.

7. *Id.*

8. The term "plain text" is itself not without ambiguity. I use the term as understood by textualists, to refer to the statutory language in semantic isolation, without consideration of its purpose or nonlinguistic context. "Plain meaning," in turn, is the meaning of the text that would be given by a "skilled, objectively reasonable user of words." *See* John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 109 (2001) [hereinafter Manning, *Equity*] (citation and quotation marks omitted).

9. *See* John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 10 (2014) [hereinafter Manning, *Constitutional Power*].

conclusion brought home forcefully by the D.C. Circuit: courts *must* respect legislative compromise, wherever it might *possibly* exist.[10]

The need to preserve legislative compromise is not merely a consequence of new textualism—it is a central justification for the theory. And it is what largely distinguishes new textualism from more moderate forms of textualism. I refer to it as the "Bargaining Argument" ("BA"). The importance of the BA to the defense of textualism has gone largely unrecognized. Nor has the argument been directly and comprehensively contested.[11]

The BA begins from the premise that the Constitution was designed to protect minority rights. In particular, the Constitution gives political minorities an outsized right to insist upon legislative compromise. To effectuate this purpose, courts must respect legislative compromises that appear in a statutory text to the maximum extent possible. A second premise is that any piece of statutory text might be the result of legislative compromise, i.e., a bargain struck between two or more interested actors over what the words should say.[12] The conclusion of the argument is that courts should rarely, if ever, deviate from the plain text of a statute, lest they disrupt a bargain that the Constitution requires to be protected.

This article will pursue three broad claims:

First, while new textualism has been supported by numerous arguments, the BA has become the most important. Unlike other, less formalistic arguments for new textualism, the BA allows proponents to claim that their theory is mandated under the Constitution. The impact of the argument is also far-reaching: it has become the central justification for textualism among both academics and judges.

Second, the BA lacks adequate support. In particular, proponents have not explained why the Constitution's solicitude for minority rights requires the preservation of legislative compromise to the maximum extent

10. The application by some textualists of a narrow, rarely invoked "absurdity doctrine" is a minor qualification to this point that the reader should bear in mind throughout this Article. *See generally* John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003) [hereinafter Manning, *Absurdity*]. For simplicity's sake, I do not discuss the doctrine at length, and I paraphrase the strong textualist position as one that seeks to preserve compromise to the maximum extent possible, which should be read to mean: to the extent there is *any* reasonable possibility the statutory provision at issue was the result of the compromise.

11. This is not to say that the argument has not been contested at all. Jonathan Molot, for example, seems to be talking about the BA when he notes that certain "aggressive textualists" have tended to focus on "just one element of the judicial role—the judiciary's responsibility for protecting the constitutionally prescribed lawmaking procedures." Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 53–59 (2006). Molot argues that such textualists have neglected the equally important constitutional prescription of separation of powers, particularly the responsibility of judges to "cabin the influence of particularly powerful interests." *Id.*

12. I use the terms "bargain" and "compromise" interchangeably.

possible. This Article will refer to this purported requirement as the "maximalist position" with regard to legislative compromise. Unless the maximalist position can be defended, textualists cannot explain why the mere possibility that a statutory provision resulted from a bargain requires that courts must adhere to the literal text against opposing indicia of intent.

Third, I suggest that without the BA, textualists cannot show that their theory is grounded in more objective criteria than alternatives such as moderate purposivism. This is not to say that such a showing could not been made; merely that it has not yet been made. Textualism is portrayed as having a theoretical soundness that it has not attained.

I. Varieties of Textualism

The term "textualism" encompasses a number of related theories. My goal in this section is not to provide yet another explanation of what textualism is, but merely to situate the BA within the framework of textualist theories.

All textualist theories in some way prioritize the plain meaning of a legal text,[13] and they fall under the faithful agency model of statutory interpretation.[14] In this section, I briefly describe three versions of textualism.

First, there is an older "plain meaning" school, which held that where the plain meaning is clear, there is no need to look outside the "four corners" of the legislative enactment at all.[15] This school was prominent in the late 19th and early 20th centuries.[16] Courts following this approach tended to speak "as if the determination that a statute had a 'plain meaning' foreclosed any necessity to consider context."[17]

Next there is what William Eskridge has called the "traditional approach" to statutory interpretation. This approach adopted what he calls the "soft plain meaning rule." Under the traditional approach, plain meaning is the "best evidence of legislative intent," but it may be rebutted by compelling evidence of a contrary legislative intent, including from extratextual sources like legislative history.[18] Unlike the plain meaning

13. WILLIAM N. ESKRIDGE ET AL., LEGISLATION AND STATUTORY INTERPRETATION 231 (2d ed. 2006) [hereinafter ESKRIDGE ET AL., STATUTORY INTERPRETATION].

14. Thomas M. Merrill, *Faithful Agent, Integrative, and Welfarist Interpretation*, LEWIS & CLARK L. REV. 1565, 1567 (2010); *see also* Manning, *Equity*, *supra* note 8, at 5 ("In our constitutional system, it is widely assumed that federal judges must act as Congress's faithful agents.").

15. *See* John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 79 & n.29 (2006) [hereinafter Manning, *What Divides*].

16. *Id.*

17. *Id.*

18. William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 626, 623 (1990).

school, the traditional approach did not foreclose consideration of any relevant context. According to Eskridge, this form of textualism is consistent with the Supreme Court's "practice for most of [the 20th] century."[19]

The theory that will be the central focus of this article, new textualism, holds that the only object of statutory interpretation is to determine the meaning of the text and that "the only legitimate sources for this inquiry are text-based or -linked sources."[20] In contrast to the plain meaning school, new textualists are willing to consider context outside the four corners of the text, particularly "*semantic context*—evidence that goes to the way a reasonable person would use language under the circumstances."[21] The semantic context tells us how an ordinary user of legal language would interpret the text.[22] But the ordinary user of legal language is unlikely to be an ordinary citizen. Instead, she is likely to be an expert who understands "specialized conventions," including canons of construction.[23] Under new textualism, then, the plain meaning of statutory language, standing by itself, may be rebutted by semantic context such as an applicable canon of construction.

An essential difference between the soft plain meaning rule and new textualism, and one that will be a central focus of this Article, is that under the latter approach, if the plain meaning of the text would be clear to the relevant interpreter (taking into account semantic context), then the "background purposes" of the statute are irrelevant.[24] New textualists "give determinative weight to clear semantic clues even when they conflict with the policy context."[25] Manning defines "policy context" as "evidence that suggests the way a reasonable person would address the mischief being remedied."[26] This definition is consistent with the "strong purposivism" of Henry Hart and Albert Sacks. For the remainder of this Article, however, I will rely on a slightly broader definition, one that is compatible with a more moderate purposivism. I define "policy context" as nonsemantic evidence of "how the enacting legislature would have decided the interpretive

19. *Id.* at 628.
20. ESKRIDGE ET AL., STATUTORY INTERPRETATION, *supra* note 13, at 236.
21. Manning, *What Divides*, *supra* note 15, at 76.
22. *Id.* at 78.
23. *Id.* at 78, 98.
24. *Id.* at 73.
25. *Id.*
26. Manning, *What Divides*, *supra* note 15, at 76.

question facing the court."[27] This definition lacks the assumption that the legislature has sought the most reasonable remedy available.[28]

New textualism is not a monolithic theory, and its proponents do not always agree. For example, new textualists disagree about whether judges are justified in applying the absurdity doctrine, which holds that courts may deviate from the plain meaning of a statute when it produces absurd results.[29] But an important point for this Article is that, of the small number of judges and academics who have vaulted new textualism to prominence, all have espoused some form of the BA.[30]

There is general agreement that the leading new textualist judges include Supreme Court Justices Antonin Scalia and Clarence Thomas and Judge Frank Easterbrook on the Seventh Circuit Court of Appeals. After *King*, we can probably add Justice Samuel Alito to this list. Among academics, the leading theoretician of statutory textualism is undoubtedly John Manning. Manning has written numerous articles about textualism, and William Eskridge has identified Manning as "new textualism's main defender."[31]

Other forms of textualism exist besides new textualism. But the new textualism espoused by Scalia, Easterbrook, and Manning is by far the most influential version of the theory, both in academia and in courts. As will be shown below, its proponents rely heavily on the BA. Therefore, I will use the term "textualism" from this point forward to refer particularly to new textualism. Moreover, because Manning has put forth the most complete and sophisticated exposition of the argument, I will treat his version as authoritative for purposes of this Article.

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27. Martin H. Redish & Theodore T. Chung, *Democratic Theory and the Legislative Process: Mourning the Death of Originalism in Statutory Interpretation*, 68 TUL. L. REV. 803, 813 (1994).

28. Note that this definition is compatible with a more nuanced form of intentionalism, which is not concerned with the *actual* subjective intent of legislators but rather with *constructing* a fictive intent based on reading the text as embodying one legislative "voice."

29. *Compare* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528–29 (1989) (applying the absurdity doctrine), *with* Manning, *Absurdity*, *supra* note 10 at 2395 (arguing against the doctrine).

30. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting); Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461 (2002) (Thomas, J., majority opinion); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 535 (1983); Manning, *Absurdity*, *supra* note 10, at 2390.

31. William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776-1806*, 101 COLUM. L. REV. 990, 992 (2001) [hereinafter Eskridge, *All About Words*].

II. What Is The Bargaining Argument?

The BA has been around in inchoate form for several decades. In 1984, a unanimous Supreme Court in *Board of Governors of Federal Reserve System v. Dimension Financial Corp.* articulated the core argument as it might be summed up today:

> The "plain purpose" of legislation . . . is determined in the first instance with reference to the plain language of the statute itself. Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises. Invocation of the "plain purpose" of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent.[32]

Frank Easterbrook argues in his influential article, *The Court and the Economic System*, that "[i]f legislation grows out of compromises among special interests," courts should not rely on the purpose of the legislation to "get more of what Congress wanted."[33] Like the Court's reasoning in *Dimension Financial Corp.*, Easterbrook considers the purposivist approach inappropriate in large part because it is unfaithful to the Congressional intent to compromise. As he put it, "[w]hat Congress wanted was the compromise, not the objectives of the contending interests."[34]

As these examples suggest, earlier versions of the BA tended to be a reaction against the excesses of a strong purposivist approach that viewed statutory language through the rose-colored glasses of legislators' "public-regarding rhetoric" describing its overriding purpose, without recognizing

32. Bd. of Governors of Fed. Reserve Sys. v. Dimension Fin. Corp. 474 U.S. 361, 373–74 (1986) (citation omitted).

33. *See* Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4, 46 (1984).

34. *Id.*

that the terms may in fact reflect competing purposes and interests.[35] This concern predates new textualism. In a 1970 Supreme Court decision, for example, the Court counseled against "[r]adical reinterpretations" of statutory language "in order to effectuate a broad policy."[36] The Court stated: "Care must be taken . . . to respect the limits up to which Congress was prepared to enact a particular policy, especially when the boundaries of a statute are drawn as a compromise resulting from the countervailing pressures of other policies."[37]

The inchoate version of the argument did not uniquely support new textualism. As the passages above demonstrate, it was framed primarily as a way of getting at congressional intent.[38] By contrast, the argument for textualism is a more formalistic and less concerned with a search for "intent." It holds that a clear text should prevail even over evidence that the results were not intended by a majority of legislators. It is to this argument that I now turn.

The newer version of the BA rests on the premise that any part of a statute—but particularly an odd or incongruous part—may be the result of legislative compromise. As Manning has argued, "because a statute's apparently odd contours may reflect unknowable compromises or legislators' behind-the-scenes strategic maneuvers, judges can rarely, if ever, tell if a law's specific wording is unintentionally imprecise or was instead crafted to navigate the complex legislative process."[39] Or, as Justice Thomas, writing for a majority of the Supreme Court, put it: A statute's "delicate crafting [may] reflect[] a compromise amidst highly interested parties attempting to pull the provisions in different directions."[40]

It is important for the BA that any legislative compromise could always have played a *decisive* role in the success of legislation—that the statute would not have passed without it.[41] But textualists argue that there

35. William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 335 (1990).

36. United States v. Sisson, 399 U.S. 267, 298 (1970).

37. *Id.*

38. The concept of "congressional intent" is a something of a theoretical thicket. I assume for this article that at a minimum it is possible to conceptualize a fictional congressional intent by treating statutes as the product of a fictional "single author": Congress. I recognize that this conception requires a theoretical defense but will not pursue this defense here.

39. Manning, *Absurdity*, *supra* note 10, at 2395. By "behind-the-scenes strategic maneuvers," Manning appears to be referring to what is essentially an anticipatory compromise—selecting particular statuory language in order to ensure passage of the legislation.

40. Barnhart v. Sigmon Coal Co., 534 U.S. 438, 461 (2002).

41. Manning, *Federalism and the Generality Problem*, 122 HARV. L. REV. 2003, 2016 (2009) ("[R]eliance on purpose threatens to upset *necessary* legislative compromises because it arbitrarily shifts the level of generality at which the lawmakers have expressed their policy.") (emphasis added).

is no point in trying to engage in an empirical investigation of whether a particular compromise was decisive, because "[this] question is simply unanswerable after the fact."[42]

Thus, it is never possible for courts to know which straw might have broken the camel's back. Where competing interests are at stake, "a change in any individual provision could . . . unravel[] the whole."[43] Judges cannot answer the question of "whether the legislature—constrained by the legislative process—would have been able to agree on wording that would include or exclude [a] troubling application or omission."[44]

In sum, textualists argue that the legislative process leaves two related "unanswerable" questions about the enacted text: (1) Was the text a product of a legislative bargain among competing interests; and: (2) Was the particular wording of the text essential to its enactment. The two questions are connected, but they have a distinct relevance. For example, the first point entails that we should care about preserving legislative bargains even if they were not essential to enactment. Legislative expertise and the legislator's role in representing her constituents—including interest groups that may lobby for changes in the text—provide sufficient reason to respect a compromise even when the legislation would have passed without it. Conversely, the particular wording of the text may have been essential to its passage even if it was not the result of a direct compromise. One could imagine a legislator inserting certain language into a bill in order to preempt concerns from another legislator or an outside interest group, even if that party did not actually participate in drafting the law. The upshot of this discussion is that textualism considers both the nature of the legislative process and the intent of individual legislators to be unknowable.

III. The Constitutional Dimension of Legislative Compromise

The formalist version of the BA is not based on considerations of what interpretive method is most likely to capture "congressional intent," however conceived. Instead, it is based on constitutional necessity of preserving legislative compromise. Manning's basic claim is that the textualist approach is most faithful to the constitutional design because it furthers the Framers' intent to give legislative minorities the right to insist upon compromise as "the price of assent."[45] The key constitutional

42. Manning, *Absurdity*, *supra* note 10, at 2410.

43. *Barnhart*, 534 U.S. at 461.

44. Manning, *Absurdity*, *supra* note 10, at 2409–10.

45. John F. Manning, *Second-Generation Textualism*, 98 CALIF. L. REV. 1287, 1314 (2010) [hereinafter Manning, *Second-Generation*].

provision for the BA is the bicameralism and presentment clause of Article I, Section 7 ("bicameralism").[46]

A. The Early Formalist Argument

Textualists' reliance on bicameralism is not a recent development. Justice Scalia and Judge Easterbrook, among others, have argued for more than two decades that relying on legislative history to determine congressional intent violates the constitutionally prescribed lawmaking process of bicameralism.[47] They claim that, because only the enacted text of the law has been approved by both chambers and presented to the President, nothing else may serve as a valid expression of Congress's intent.[48] At bottom this argument reflects two concerns.

The first is with the *unreliability* of expressions of intent that have not gone through the bicameralism process. This concern relates to the issue of the "opacity" of legislators' intentions, discussed above. The textualist position is that the most reliable way to know what *all* of the legislators who passed the bill intended is to look at what the text says. By contrast, external sources of intent, such as legislative history, may reflect the views of only some members, or even mere political posturing.

The second concern is with the *illegitimacy* of nontextual sources of intent; that it is unconstitutional—and undemocratic—to give voice to nontextual indicators or intent that have not undergone the careful process that the Constitution has prescribed in order to ensure adequate deliberation and representation. Only the text is law.

As framed in these early arguments, textualism's reliance on bicameralism was flawed, or at least incomplete.[49] On the issue of reliability, Manning notes that the Supreme Court has moved away toward an "equilibrium" that has pared back the excesses of prior, indiscriminate use of legislative history, while "ultimately conclud[ing] that no one has made the case for the inherent unreliability of such materials in all contexts."[50] The question of reliability is ultimately empirical in nature—either legislative history represents what a majority of Congress believes about the purposes and/or intended effects of a statute, or it does not.

46. *See* Manning, *Equity*, *supra* note 8, at 70–79.

47. Manning, *Second-Generation*, *supra* note 45, at 1292 & n.28.

48. *See, e.g.*, Thompson v. Thompson, 484 U.S. 174, 191–92 (1988) (Scalia, J., concurring in the judgment).

49. I emphasize that I am not suggesting that a strong empirical or pragmatic argument for textualism cannot be made. This Article is only directed to the leading theory of textualism, which is formalistic.

50. Manning, *Second-Generation*, *supra* note 45, at 1308.

For a committed textualist, the illegitimacy aspect of non-statutory sources appears to provide firmer ground to assert that such sources are inherently suspect, at least when such sources come into conflict with the plain text. But the illegitimacy argument in its conventional form also suffers from serious flaws.

First, bicameralism alone does not by itself provide sufficient reason to disregard extratextual sources or background statutory purposes. Manning has framed the issue clearly:

> Textualists often rely on the formal claim that bicameralism and presentment mandate textualism because the enacted text alone has survived the legislative process requirement of Article I, Section 7. In formal terms, however, invoking the requirements of bicameralism and presentment provides us merely with a rule of recognition, telling us only which texts to interpret as enacted law. The process alone does not tell us how to interpret the law thus enacted . . . . If textualists object to using background statutory purpose to shift the level of generality of one or more clear and specific statutory provisions, then the basis of that objection must come from beyond the formal requirements of Article I, Section 7.[51]

In other words, based solely on the process of bicameralism, it cannot be inherently illegitimate for judges to use a nontextualist approach to interpretation, so long as judges interpret the enacted text and not something else. There will be some cases where consultation of extratextual sources may shed more light on how a statutory provision was designed to operate than the bare text alone.

Manning goes on to argue that much of the evidence concerning "the purposes implicit in bicameralism . . . speaks inconclusively as to the appropriate interpretive method."[52] "Although such considerations might reasonably suggest that judges should scrupulously enforce the precise outcomes of this carefully designed deliberative process, the same considerations might also support interpretive rules designed to reinforce the underlying values that the process seeks to advance."[53] Manning is admirably forthright about the crossroads that bicameralism presents. Arriving at these crossroads, judges who think that the question of whether the Constitution assigns an "appropriate interpretive method" is itself

51. Manning, *Equity*, *supra* note 8, at 70–71.

52. *Id.* at 72.

53. *Id.* at 74.

"unanswerable" may be tempted to look in other directions—such as politics, tradition, and pragmatism—for guidance as to what method to use.

Manning, however, believes there *is* a concrete constitutional answer to the question of interpretive method: this answer is expressed in his version of the BA.

B. The Argument from Structural Inferences

The newer version of the BA is a more complex constitutional argument. It starts from the premise that the protection of minority rights through the legislative process is a central objective of the Constitution. It may seem odd for a foundational defense of textualism to begin with an ostensibly purposivist claim about the Framers' objectives and general intentions. But this approach is not actually at odds with textualist methodology. Manning has written that constitutional textualism "entails recovering or reconstructing the historically situated meaning of the constitutional text."[54] As noted above, textualism allows policy context to illuminate—though never contradict—ambiguous terms in the plain text. What is more, Manning has argued that the BA applies with equal force to constitutional interpretation, at least where separation of powers is concerned, because in dividing powers, the Framers "struck a balance" between competing purposes and interest groups.[55] He argues that, "every detail of the American separation of powers had to be bargained for."[56]

Instead of broad, freestanding principals like separation of powers or federalism,[57] Manning favors "clause-centered methods of textual interpretation."[58] One of these methods is to make "structural inferences" about the meaning of a "semantically indeterminate" text "by considering how it fits within the context of related provisions."[59]

The textual hook for the BA is the phrase "the judicial Power," from sections 1 and 2 of Article III. While the Constitution clearly authorizes courts to interpret federal law, it does not specify *how*. It does not tell us what approach to statutory interpretation to use. Manning therefore claims that the phrase is "semantically indeterminate" and requires structural inferences to determine its precise meaning.[60]

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54. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1975 (2011) [hereinafter Manning, *Separation*].

55. *Id.* at 1978–89.

56. *Id.* at 1978.

57. *Id.* at 2038.

58. *Id.* at 1949.

59. *Id.* at 2034.

60. *Id.*

At this point, one might wonder why one would think the Constitution contains an affirmative answer to the question of how to interpret laws; why it would implicitly *require* one method of interpretation rather than doing so explicitly. More on this later. For now, suffice it to say that the answer brings us back to Manning's approach of constitutional interpretation—a theory favored by textualists generally—that we should seek to recover the historically situated meaning of the text. How should we recover the meaning of "the judicial power"? One way would be to consult the historical context of the drafting of the Constitution, as well as early understandings of the Vesting Clause in the nation's early history.

This is the approach taken by William Eskridge. Eskridge argues that "judicial power" was not originally understood to entail a technical approach to statutory interpretation akin to modern textualism, and that, for early judges like John Marshall, judging was more of an art than a science. Early American judges gave heavy weight to the plain text but also took into account "legal and sometimes political context."[61] Eskridge also consults the analogous "legislative history" from the ratification of the Constitution and concludes that the ratification debates suggest that the Framers likely believed the federal courts could prioritize principles of equity over the text at least in some instances.[62] The general impression from Eskridge's analysis is that the Framers did not intend the phrase "judicial power" to implicitly prescribe any particular interpretive approach.

Manning concedes that "those who participated in the ratification debates were not of one mind on the subject" of how courts should interpret statutes.[63] He also acknowledges that "the pre-Marshall Court jurisprudence is largely inconclusive" on the subject.[64] He therefore looks to the structure of the Constitution for insight as to whether the "judicial power" contains a prescription for textualism.

1. Bicameralism and Presentment Clause and Article V

The primary constitutional support for the BA comes from two parts of the document: the bicameralism process laid out in Article I, Section 7, and Article V's exception to the constitutional amendment process for states' "equal suffrage in the Senate." Manning argues that, taken together, these provisions decisively manifest a "structural policy" of protecting minorities against "majority oppression."[65] Specifically, bicameralism sets

61. Eskridge, *All About Words*, *supra* note 31, at 1086.

62. *Id.* at 1040.

63. Manning, *Equity*, *supra* note 8, at 84 & n.33.

64. *Id.* at 87.

65. *Id.* at 70–71.

up a de facto "supermajority" requirement for the passage of legislation.[66] Small states and other minority interests are the special beneficiaries of bicameralism because of the composition of the Senate. Therefore, "the legislative process is designed to give minorities an exaggerated right to insist upon legislative compromise as the price of assent."[67]

This inference aligns with the federalist concerns of the Framers. In particular, that the interests of small states and other political minorities must be protected under the constitutional system. According to Manning, further evidence of this intent is found in the fact that "the states' equal representation in the Senate . . . is the one part of the [constitutional] design that Article V purports to place even beyond the amendment process."[68] The conclusion of this line of argument is that: "Interpreting statutes to be more coherent and just expressions of legislative purpose, then, risks evasion of a constitutionally ordained purpose—to give minorities a disproportionate say in the legislative process."

2. Necessary and Proper Clause

In recent scholarship, Manning advocates for the Necessary and Proper Clause as an additional pillar of support. Specifically, he argues that the discretion to determine what is "necessary" and "proper" to implement the Constitution's powers belongs to Congress, not the courts.[69] Because the Constitution vests this discretion with Congress, courts should apply *Chevron*-like deference to Congress's implementation of its constitutional powers.

As Manning frames it, Congress's "implementation power" is the power to choose the "necessary and proper" means for implementing the Constitution. He argues that this power has specific implications for statutory interpretation. The argument proceeds as follows: The Necessary and Proper Clause gives Congress the discretion to prescribe the means of constitutional power.[70] Among those powers is the power to make laws concerning subjects enumerated in Article I, which provides Congress the express authority to set federal policy through "statutory means."[71] But the Necessary and Proper Clause further broadens Congress's lawmaking

66. *Id.* at 75–76.

67. *Id.* at 77–78.

68. *Id.* at 76.

69. *See* Manning, *Constitutional Power*, *supra* note 9, at 65 ("By analogy, the Necessary and Proper Clause is a constitutional grant to Congress of implementational rulemaking authority.").

70. *See generally id.* Manning spends eighty-four pages articulating the argument for this proposition, so I will not attempt to summarize it here.

71. *Id.* at 20.

powers. Whereas Article I provides the power to make laws, the Necessary and Proper Clause provides Congress with the discretion to write them in the manner it sees fit. As relevant here, the clause implicitly gives Congress the power "to write incoherent, overbroad, or incomplete legislation," if it wishes to, particularly for the purpose of enshrining legislative compromise.[72]

This part of Manning's Necessary and Proper Clause argument, as it relates to statutory interpretation, is really a counterargument to strong purposivism. Manning believes that "purposivism's true grounding [is] in structural constitutional assumptions."[73] Purposivists, he argues, think that: "If the details of statutory meaning do not advance the [statute's] underlying policy, it furthers the *constitutional policymaking function of Congress*, properly conceived, for the Court itself to substitute new means that achieve the desired end."[74] The primary purposivist "assumption" Manning seems to be referring to is that courts can—and should—help Congress exercise its Article I powers by interpreting laws in a way that makes the law "more coherent with its apparent background policy."[75] Under this assumption, courts are like the apprentices who add the finishing touches and blot out any obvious errors to the master's painting.

To which the textualist responds: maybe the master left the painting unfinished for a reason. And maybe that apparent "error" is no error at all, but a carefully crafted compromise. Because Congress has broad power not only to make policy, but also to make incoherent or incomplete policy, courts should not undermine Congress's ability to do so by smoothing out rough edges or filling in gaps that may have been intentional. Otherwise, Congress will not be able to draft those gaps and rough spots with precision, or to accommodate legislative bargaining that furthers minority power.

Manning's Necessary and Proper Clause argument is largely subsidiary to his bicameralism/minority rights argument.[76] The Necessary and Proper Clause does not directly support textualism unless there is some prior reason for courts to presume that awkwardness or incoherence in the text is intentional. Otherwise, this argument simply begs the question whether Congress has actually "chosen" statutory means that are

72. *Id.*

73. *Id.* at 18.

74. *Id.* at 20 (emphasis added).

75. *Id.*

76. *Id.* at 76 (implying that "the aim of the Court's textualism" should be "to facilitate precise legislative communication").

"incoherent, overbroad, or incomplete,"[77] or whether these features are inadvertent and perhaps undesirable from the perspective of the legislators who voted for it.

This is why the point about "precision" is so important. The Necessary and Proper Clause, in Manning's view, creates another narrow "structural inference" concerning how statutes should be interpreted. The inference is: because the clause gives Congress such broad power to craft laws that define the contours of the Constitution, it is appropriate that Congress should have the *broadest available tools* for the doing so. One of these tools is to draft statutes that "adopt an odd, half-a-loaf compromise."[78] But if Congress sands down the rough edges of compromise, Congress's power to memorialize the compromise in the text will be diminished, and one of its most powerful tools will have been taken away by the judiciary.

IV. The Constitution and Hidden Compromise

To sum up: According to Manning, the process of bicameralism, its de facto "supermajority requirement," and the allocation of outsized power to political minorities in places like Article V's placement of equal Senate suffrage beyond the amendment process, are all textual indications that the Framers prioritized the right of political minorities to insist upon compromise as the price of assent. Because textualism seeks to preserve legislative compromise to the maximum extent, we should interpret "the judicial power" as conferring upon courts only the power to apply the plain text of the statute (read in its semantic context), even when a textual provision appears starkly at odds with the statute's apparent purpose(s). What is more, the broad implementation power that the Necessary and Proper Clause gives to Congress provides an additional indication that, where Congress chooses half measures to address a problem, the Framers intended that this choice be respected.

Much of this argument is relatively uncontroversial. Most judges and constitutional scholars would probably agree that if members Congress settled on an awkward compromise in a statute in order to get the legislation passed, courts should respect this compromise, even if it undermines the professed goals of the legislation. Allowing judges to improve upon statutes without regard for the constitutionally sanctioned

77. *See id.* at 20 (arguing that purposivism makes it "harder for Congress to exercise its 'necessary and proper' power to *choose* statutory means—and in particular, to write incoherent, overbroad, or incomplete legislation") (emphasis added).

78. *Id.* at 21.

process for passing legislation is a recipe for confusion, arbitrariness, and anti-democratic judicial lawmaking.[79]

But the BA makes two related assumptions that are not as intuitive. First, textualists assume that all compromises are created equal and that backroom deals deserve the same protection from judges as bargaining in plain view. Second, textualists seem to insist that compromises must be respected to the maximum extent possible.

A. Two Kinds of Compromise

There are two ways to arrive at a compromise over the meaning of a statutory provision. The first is to do so openly, either by making the bargaining process visible to the public or by informing the public of the existence or outcome of closed-door negotiations. An open compromise can also be apparent from various sources, including legislative history and the different versions that a bill has gone through to reach its final form. The second method is to horse trade behind closed doors, such that the existence of the compromise is never known.

The difference between these two kinds of compromise is a matter of degree. At one end of the spectrum are bargains that remain completely hidden—the public has no way of knowing that a compromise was ever reached regarding the issue. (If in fact a deliberate compromise was reached over the phrase "established by the State" in the ACA, it was completely hidden). On the other end of the spectrum are compromises of which the public is fully informed. For example, *King* would have been a case about open compromise had the legislative history to the ACA indicated that lawmakers agreed the phrase "established by the State" would be used to exclude federally established exchanges from subsidies. (But, of course, the legislative history did not provide any such indication.) Furthermore, as explained below, there are gray areas between "fully open" and "fully hidden," for example, where we know that a particular provision was the focus of compromise but do not know exactly why it was written the way it was. Nonetheless, for ease of exposition, I treat the issue as a binary one.

79. *Cf.* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 91 (1st ed. 1765) ("[I]f the parliament will *positively* enact a thing to be done which is unreasonable, I know of no power that can control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that where the *main object* of a statute is unreasonable the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government.") (emphasis added).

1. Open Compromise

There are numerous cases where the Supreme Court has weighed the importance of open compromise. I will highlight three here.

The first example is of a compromise evidenced by different iterations of a bill that was shaped by pressure from outside interest groups. The Court recently took into account such compromise in *Jones v. Harris Associates L.P.*[80] In *Jones*, the Court considered a provision of the Investment Company Act of 1940 that imposed a "fiduciary duty" on investment advisors "with respect to compensation received from a mutual fund."[81] The Court noted that the statute's fiduciary duty standard was the product of a "delicate compromise."[82] This was not mere speculation. The Court described how Congress initially considered a remedy that would allow the SEC to challenge compensation that was not "reasonable."[83] Language to this effect was proposed in the House of Representatives, but it was ultimately rejected after industry representatives objected.[84] In analyzing the meaning of "fiduciary duty" in the Act, the Court relied upon Congress' rejection, under pressure from interest groups, of the "reasonableness" standard. The Court believed that this apparent compromise weighed against interpretations of the Act that would result in "judicial second-guessing of informed [mutual fund company] board decisions."[85]

The second example concerns an interbranch compromise documented in the House Reports. In *Block v. N. Dakota ex rel. Board of University & School Lands*, the Supreme Court relied on evidence of an open compromise to reject a plausible interpretation.[86] The Court considered whether the statute of limitations of the Quiet Title Act of 1972 ("QTA"), which waived sovereign immunity as to certain title claims, applied to North Dakota as a separate sovereign.[87] North Dakota argued that, even if the statute of limitations applied, it could still sue the federal government under an officer-suit theory.[88] Addressing the officer-suit theory, the Court looked to legislative history, which revealed that the twelve-year statute of limitations was a hard-fought compromise between Congress and the

80. Jones v. Harris Associates L.P., 559 U.S. 335 (2010).

81. *Id.* at 340.

82. *Id.*

83. *Id.*

84. *Id.* at 340–41.

85. *Id.* at 352.

86. Block v. N.D. *ex rel.* Bd. of Univ. & Sch. Lands, 461 U.S. 273 (1983).

87. *Id.* at 275–77, 290.

88. *Id.* at 280.

Executive Branch.[89] In particular, Congress arrived at the twelve-year figure as part of a bargain to eliminate a grandfather clause in the final bill.[90] In rejecting the state's theory, the Court reasoned: "if North Dakota's position were correct, all of the carefully-crafted provisions of the QTA deemed necessary for the protection of the national public interest could be averted."[91]

Block also relied on this history of compromise to reject the argument that the QTA's statute of limitations did not apply to states. The Court first noted that the literal text did not support North Dakota's position.[92] Under the older plain meaning school of interpretation, this would likely be the end of the story, and the state would lose. But, textualism takes into account the "semantic context" of legislation, including any applicable canons of construction. In *Block*, North Dakota argued that "precedence should be given to the . . . canon of statutory construction that statutes of limitations should not apply to the States absent express legislative inclusion."[93] While acknowledging that this canon might otherwise be applicable, the Court rejected it in light of the specific evidence of an open compromise between Congress and the Executive Branch.[94]

In the third example, the Court considered evidence that a compromise occurred, even where the specific details were never disclosed. (This circumstance falls somewhere in the gray area between fully open or hidden compromise.) In *Stewart v. Abend*, the Court took up a provision of the Copyright Act of 1909 that was drafted in a series of negotiations over "controversial and intertwined issues" between interested parties including "authors, composers, book and music publishers, and motion picture studios . . . ."[95] The negotiations were successful, but, perhaps as a byproduct of this success, lawmakers did not feel the need to elaborate on what the compromise language meant. Nonetheless, in light of evidence of collaborative drafting of the provision by competing interest groups, the Court concluded that it should adhere closely to the literal language of the statute. The Court reasoned that "[t]he process of compromise between competing special interests leading to the enactment of the 1976 Act

89. *Id.* at 284.

90. *Id.*

91. *Id.* at 284–85.

92. *Id.* at 287.

93. *Id.* at 288.

94. *Id.* at 290.

95. Stewart v. Abend, 495 U.S. 207, 225–26 (1990) (citation and internal quotation marks omitted).

undermines any such attempt to draw an overarching policy out of" the contested provision.[96]

As these examples illustrate, compromise is not necessarily invisible. An open compromise may be shown in various ways, including comparisons of different drafts of legislation, as in *Jones*; statements or documents in congressional reports, as in *Block*; and specific evidence about the drafting process, as in *Stewart*. There is no "hierarchy" among these different forms of evidence, or indeed between different types of compromise in general. A compromise between legislators is neither superior nor inferior to a compromise between interest groups that is approved by legislators. At bottom, evidence of compromise is simply evidence of intent. Where the Court has been presented with such evidence it has not hesitated to rely on it. Nonetheless, as textualists forcefully emphasize, some, and probably most, legislative compromise remains invisible, with no evidence to show if and how it occurred.

2. Hidden Compromise

By "hidden compromise" I mean a textual concession to or triangulation between one or more interest groups, including lawmakers, the nature of which is invisible, and generally unknowable, to the general public and by extension to courts. I include within this definition a compromise that one might expect to have taken place given how the legislative process works in general, or given the controversial nature of a law, but about which nothing specific is known. In almost any major legislation, one can expect the wording of the law in various places to be the product of negotiations among lawmakers or lobbying from special interest groups. For example, if an early version of a bill provokes an outcry from an influential interest group, and that group later drops its objection to a dramatically altered version of the legislation, one might safely assume that some kind of compromise went on behind the scenes. Part of the compromise may be "visible," as in cases where a controversial provision is dropped from the statute. But, particularly in complex "horse-trading" situations, it may be impossible to discern where in the legislation any compromise occurred.[97]

Thus, judges cannot "discover" hidden compromise. As I am defining it here, there is nothing to discover; if the existence of compromise could be inferred from evidence inside or outside the text, it would be an open compromise. The only way to account for hidden compromise in the

96. *Id.*

97. Contrast *Block v. North Dakota ex rel.*, 461 U.S. 273, 284 (1983), described above, in which the Supreme Court considered specific public evidence that the drafting of the relevant provision was the result of a compromise between different branches of the government.

interpretive process is to presume its existence. Such a presumption requires normative justification.

There are at least two types of hidden compromise. One type is inherently invisible, and the other tends to be invisible because relevant actors choose to keep it that way. The first type, "preemptive compromise," was alluded to above. Preemptive compromise is a one-sided concession that a legislative actor makes in order to avoid controversy, blowback from special interest groups, or the costly bargaining process itself. For example, a legislator trying to craft a gun control bill might unilaterally include an incongruous exemption in the text, which does not serve and may significantly undermine the statute's purposes, simply because she does not want to risk the ire of the powerful National Rifle Association and its members. Another, perhaps even more common, occurrence is the use of deliberate ambiguity in drafting to avoid conflict over the details.[98] This, too, is a form of compromise designed at heading off a political impasse. Such preemptive compromise, particularly if made by one legislative actor, will typically be inherently invisible, because there is no specific evidence for the compromise unless the actor chooses to reveal the influence that such considerations had on the drafting process.

The second type of hidden compromise is epitomized by the "backroom deal." Many Americans might consider such deals to be a blemish on the democratic process. They symbolize (in some quarters) the outsized influence that special interests have on the legislative process, particularly when these interests have campaign money to leverage. But for textualists who subscribe to the BA, backroom deals are a fundamental aspect of democracy that must be protected.

The leading Supreme Court authority concerning hidden compromise is *Barnhart v. Sigmon Coal Co.*, with Justice Thomas writing for a six-justice majority.[99] The facts of the case were as follows: In 1992, Congress passed the Coal Industry Retiree Health Benefit Act (Coal Act). One of the problems the Act was designed to address was the allocation of health benefits for retired coal workers whose employers had left the industry. The Court noted that "the Coal Act was passed amidst a maelstrom of contract negotiations, litigation, strike threats, a presidential veto of the first version of the bill and threats of a second veto, and high pressure lobbying, not to mention wide disagreements among Members of Congress."[100] The

98. *See* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting*: *A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 596–97, 602, 615 (2002) (providing strong anecdotal evidence for deliberate ambiguity in drafting).

99. Barnhart v. Sigmon Coal Co., 534 U.S. 438 (2002).

100. *Id.* at 442–47.

statute assigned benefits obligations to two types of companies: "signatory operators" that had already agreed to pay benefits under earlier collective bargaining agreements, and "related persons"—companies with a close corporate connection to signatory operators. The statute specified that successors in interest to "related persons" must contribute benefits, but it did *not* include a parallel provision for successors in interest to the signatory operators themselves.[101]

Jericol was the successor in interest to a signatory operator, and Sigmon Coal was "related person" to Jericol (collectively, "Sigmon").[102] The Commissioner of Social Security concluded that Sigmon was liable for contributions for retirees of Jericol. But the Supreme Court reversed, holding that the statute unambiguously exempted successors in interest of signatory operators from contributions, even though successors in interest of related persons—whose relationship with beneficiaries is more attenuated—are liable under similar circumstances.

Congress's stated intent in passing the Coal Act was to "identify persons *most responsible* for plan liabilities"[103] The Court nonetheless refused to import successor in interest liability for signatory operators into the statute based on this express purpose. The Court noted that the Act's "delicate crafting reflected a compromise amidst highly interested parties attempting to pull the provisions in different directions." "[N]egotiations surrounding enactment of this bill tell a typical story of legislative battle among interest groups," and "[t]he deals brokered during a Committee markup, on the floor of the two Houses, during a joint House and Senate Conference, or in negotiations with the President are not for us to judge or second-guess."[104]

The Court in *Sigmon* did not have evidence of a deal struck over the specific statutory provision at issue.[105] But the Court inferred that some kind of deal could have taken place simply because of the controversial nature of the legislation.[106] Therefore, the Court relied on "hidden compromise" to reject an opposing interpretation of the statute that was informed by statutory purposes, legislative history, and common sense. Notably, the Court did not mention the possibility of preemptive

101. *See id.* at 450–51 (citing 26 U.S.C. § 9706(a) (1994 ed.)).

102. *Id.* at 447–49, 448 n. 11.

103. *Id.* at 464 (Stevens, J., dissenting) (emphasis added) (citing Pub. L. 102–486, § 19142, 106 Stat. 3037).

104. *Id.* at 460–61.

105. *See id.* at 460–62. The Court did cite general legislative history showing that the bill's "crafting," in general, "reflected a compromise amidst highly interested parties attempting to pull the provisions in different directions." *Id.* at 461 (citing 6 Legislative History 4569–4571).

106. *See id.* at 460–62.

compromise, but there is no reason to think that such compromise would be any less deserving of judicial respect under the BA.

Barnhart is the leading case, but the Court's most far-reaching statement about hidden compromise is found in *Ragsdale v. Wolverine World Wide, Inc*.[107] There, Justice Kennedy, writing for a 5-4 majority, suggested in dictum that "*any* key term in an important piece of legislation" is the result of compromise.[108] The compromise Justice Kennedy was referring to in *Ragsdale* was at least partly open, as evidenced by the legislative history.[109] But *Ragsdale* illustrates a recent trend in textualism toward a general presumption that awkward or incoherent statutory provisions are the result of compromise.

Among individual judges, Justice Scalia and Judge Frank Easterbrook were early proponents of preserving hidden compromise. Justice Scalia has argued that "[t]he final form of a statute, especially in regulated fields . . . is often the result of compromise among various interest groups, resulting in a decision to go so far and not farther."[110] He wrote: "The problem with judicial intuition of a public policy that goes beyond the actual prohibitions of the law is that there is *no way of knowing* whether the apparent gaps in the law are intentional or inadvertent."[111] Like Justice Kennedy's statement in *Ragsdale*, Justice Scalia relies on assumptions about how legislation is drafted to support a presumption of compromise. Similarly, Judge Easterbrook has written that "[l]egislation reflects compromise among competing interests[,]" and so "[i]t upsets the legislative balance to push the outcome [of a conflict between interest groups] farther in either direction."[112]

B. Bases for a Presumption of Compromise

The primary distinction between the new textualism of proponents like Scalia, Easterbrook and Manning, on the one hand, and the soft purposivism of judges like John Paul Stevens and Steven Breyer, on the other, is the strong blanket presumption of hidden compromise described in the preceding section, which textualists employ but purposivists do not.[113] One reason for importing such a presumption is suggested by Justice

107. Ragsdale v. Wolverine World Wide, Inc., 535 U.S. 81 (2002).

108. *Id.* at 93–94 (emphasis added).

109. *Id.* at 94 (citing H.R. Rep. No. 102-135, at 37 (1991)).

110. E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17, 531 U.S. 57, 68–69 (2000) (Scalia, J., concurring).

111. *Id.* at 68 (emphasis added).

112. Heath v. Varity Corp., 71 F.3d 256, 258 (7th Cir. 1995).

113. *See* John F. Manning, *Competing Presumptions About Statutory Coherence*, 74 FORDHAM L. REV. 2009 (2006) [hereinafter Manning, *Competing Presumptions*].

Kennedy's dictum in *Ragsdale* that key provisions in important legislation are likely to be the result of compromise. This is an empirical assumption about the legislative process. The same assumption is also embodied in Justice Scalia's assertion that statutes are "often the result of a compromise among various interest groups."

This empirical basis for the BA aims at capturing the *actual* intent of the majority of legislators, and presuming that this intent was to compromise. But there are several pitfalls to this approach, which suggest that the empirical basis is more likely than not wrong. (At least without hard empirical evidence to the contrary.)

First, even if hidden compromise occurred, there is no reason to think that the entire legislature, or even a majority of those voting in favor, was aware of it. One can of course imagine a large "backroom deal" involving most of Congress, of which only the American public is unaware, but this scenario seems far-fetched. It is much more likely that a particular bargain would be of interest only to a select few lawmakers, or even just a single lawmaker. It is possible, as textualists assert, that the legislation would not have passed without the compromise. But it is also possible that the legislation would *not have* passed if all legislators were aware of the compromise.

Second, the size and complexity of modern legislation means that some instances of sloppy drafting are likely to go unnoticed by lawmakers until discovered by a clever litigant later. *Barnhart* is an example. The summary given above does not adequately capture the complexity of the Coal Act, with its complicated relationships between beneficiaries, signatory operators, and related persons. It is easy to imagine that even diligent and conscientious legislators could have overlooked the textual gap in liability for successors of signatory operators. The Affordable Care Act is another good example. It should be quite obvious to anyone who followed the extremely contentious public debate over the law that a great many, if not a full majority, of the legislators who voted for the law would not have thought that coverage purchased on federally established exchanges would be excluded from tax subsidies, as these subsidies go to the very heart of how the law is supposed to work.

Third, recent evidence suggests that the empirical basis for the BA relies on flawed assumptions about how the legislative drafting process works. In particular, a detailed study of the process by Professors Abbe Gluck and Lisa Bressman suggests that the drafting of bills in the House of Representatives is carried out in large part by a nonpartisan House entity,

the Office of Legislative Counsel.[114] This evidence undermines the argument that small, subtle instances of statutory incoherence are the likely result of precise drafting by legislators.

Gluck and Bressman have also presented evidence that members of Congress more often learn about the legislation from legislative history than from reading the actual text.[115] Their work corroborates anecdotal evidence, and common sense, suggesting that members of Congress do not have the time or resources to analyze bills in their entirety, particularly given the size of many statutes and the heavy congressional workload. (Note that I used "analyze" rather than "read"—for a lawmaker to actually discover inadvertent oversights or errors usually requires more than simply reading a law from front to back. Instead, it often requires the kind of complex legal analysis that can take sophisticated legal actors months to unearth and to brief). Taking the Affordable Care Act as an example, it is clear—and, from the perspective of some, notorious—that many if not most lawmakers never read the final bill before it was enacted. For example, House Judiciary Committee Chairman John Conyers, a prominent supporter of the ACA, said: "What good is reading the bill if it's a thousand pages and you don't have two days and two lawyers to find out what it means after you read the bill?"[116]

A fourth pitfall is that, to be as consistent and precise as possible, the empirical approach could not simply rely on a blanket presumption of compromise. As the quotes from Justices Kennedy and Scalia above suggest, judges seeking to faithfully apply the empirical approach would have to consider a variety of subsidiary factors bearing on the question of compromise versus inadvertence. Such factors include whether a particular provision was "key" to the passage of the legislation, the degree of contentiousness in the enactment process, whether the legislation concerns a highly regulated field, and so on. There is no reason to think judges would be able to accurately synthesize and evaluate all of the relevant factors, and therefore no firm basis for asserting that this empirical inquiry would bring us closer to "actual" legislative intent than a more purposivist approach.

Manning is well aware of these difficulties. Accordingly, he has written that, at present, there is no:

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114. Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 740–41(2014).

115. Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 968–69 (2013).

116. Victoria McGrane, *Read the Bill? It Might Not Help*, POLITICO (Sept. 8, 2009, 4:24 AM), http://www.politico.com/news/stories/0909/26846.html.

> empirical basis for concluding in any given case that awkwardness in a statute's means/ends fit is reliably traceable to either mistaken legislative expression or unrecorded compromise. Accordingly, equating respect for Congress with one presumption or the other ultimately must depend on identifying some systemic, normatively rooted premise that ultimately derives from the constitutional structure.[117]

This takes us back to the constitutional foundations of the BA, described above. Manning argues for a presumption of compromise based on the text-based structural inferences from the Constitution, which argue for courts to be "respectful of the central place of compromise in the constitutional design of the legislative process."[118]

C. The Maximalist Position

The BA assumes a "maximalist position" with regard to legislative compromise. The maximalist position holds that the Constitution should be read as requiring that compromise be preserved to the greatest extent possible, or nearly so. It does not matter if the compromise is visible or invisible, concrete or speculative. Because the Constitution's express lawmaking provisions give political minorities outsized power to insist upon compromise, we should infer from this structural policy that the compromises demanded by political minorities should be enforced by courts *in almost all possible instances*. To enforce compromise to the maximum extent possible means that courts must enforce hidden compromise. Because hidden compromises are by their nature unknowable, courts must find a way to enforce them without knowing they are there. The only way to do this is to follow the ordinary semantic meaning of the plain text.

The BA adds a new twist to the widely held textualist view of why clear semantic meaning should be dispositive. The traditional argument relies on the notion, informed by public choice theory, that there is no unified legislative intent outside of the text. There is no "meeting of the minds" among legislators except for the final product of the process. What the BA adds to this conventional view is a conception of the plain language as a necessary "tool" for securing particular outcomes sought by interest groups.

117. Manning, *Competing Presumptions*, *supra* note 113, at 2011.

118. *Id.*

According to Manning, the plain text is not merely the only viable expression of Congressional intent, but it is also the only viable tool for enacting precise compromises that may over or under enforce the purposes of the legislation. He has written that, "[i]f the Court presumes that awkward statutory outcomes typically reflect mistaken expression, then legislators cannot reliably use the only effective tool at their disposal—the phrasing of a statutory command—to express limits upon the legislative policy to which they are willing to assent."[119]

Under this view, it is important that minorities be able to rely on courts reading statutes in a highly predictable manner. Indeed, Manning suggests that the capacity for political minorities to effectively use precise language depends on courts' adoption of textualist methodology. Because textualism adheres to "semantic meaning" as the relevant linguistic community would understand it, legislative bargainers have an easy way to predict how textualist judges will predict statutory language: One must simply be familiar with the linguistic conventions of the legal community. If all judges become textualists, following the same familiar canons of statutory interpretation, it will be possible to embed very precise compromises within the text.

This conception of plain language as a tool for ensuring desired results bargained for by interest groups helps explain why, for the BA, it makes no difference whether an awkward provision was *actually* the result of compromise. What matters is that drafters have the most precise tools possible to put their intentions into words, and that, having done so, the intended meaning is not undone by judicial interpretation.[120] According to the theory, the judicial practice of imposing additional coherence on an unclear or poorly drafted text actually deprives drafters of the power to produce incoherent results as a means of securing assent from political minorities.

Following this constitutional argument to its endpoint, textualists conclude that hidden backroom deals deserve the same respect from courts as open compromises. The upshot is a strong, general presumption of compromise when the clear, plain, or literal text leads to statutory incoherence. Put simply, the maximalist position holds that it is better for courts to enforce the plain text according to predictable interpretive rules than it is to try to aid Congress by correcting apparent drafting errors.

119. *Id.*

120. Of course, textualists of all stripes have often argued that adherence to semantic meaning (however conceived) permits more precise and predictable drafting. But the BA includes an additional premise: That precise drafting tools are necessary for legislative compromise to be enforced by courts, as required by the Constitution. The BA shifts the grounds of debate from what is good judicial policy to what is required under the best interpretation of the Constitution.

Obviously, this position means that when judges are confronted with statutory incoherence, they will sometimes have to enforce results that a legislative majority would *not* have intended. But, for textualism, these undesired outcomes are the lesser of two evils. The greater evil is to depart from the Constitution's (inferred) command to respect the right of legislative minorities to insist upon compromise, whether in backrooms or out in the open

V. The Bargaining Argument in the Roberts Court

This section highlights the strong and seemingly growing influence the BA has had in the Roberts Court. As described above, some form of the argument has been around for several decades. In 2002, the Court decided *Barnhart*, which is perhaps the Court's clearest statement of the argument, albeit one that fails to describe the BA's theoretical justification.[121] The ascension of John Roberts to Chief Justice in 2005, replacing William Rehnquist, did not significantly alter the Court's approach to statutory interpretation. Chief Justice Roberts generally continues to adhere to the predominantly textualist positions of his predecessor, often voting with Justices Scalia and Thomas on issues of interpretation.[122] He also authored an opinion that specifically relies on the BA.[123]

The replacement of Justice Sandra Day O'Connor with Justice Samuel Alito was a more significant shift toward textualism. Although Justice O'Connor frequently joined opinions containing textualist reasoning and language, the consensus is that she was not a strong or consistent textualist.[124] Notably, she joined Justices Stevens and Breyer—the two most purposivist judges to serve on the Roberts Court—dissenting in *Sigmon Coal*.[125] This dissent invoked an aggressive form of the absurdity

121. It is notable that two nontextualist justices, Justices Souter and Ginsburg, joined the majority in *Barnhart*.

122. Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81, 108 (2007) (Scalia, J., dissenting); Abramski v. United States, 134 S. Ct. 2259, 2280 (2014) (Scalia, J., dissenting).

123. *See* United States v. Hayes, 555 U.S. 415, 435 (2009).

124. *See, e.g.*, Manning, *What Divides*, *supra* note 15, at 102 n.119; Bradford C. Mank, *Legal Context: Reading Statutes in Light of Prevailing Legal Precedent*, 34 ARIZ. ST. L.J. 815, 869 (2002) ("Justice O'Connor is not a textualist . . . ."); Linda D. Jellum, *On Reading the Language of Statutes*, 8 U. MASS. L. REV. 184, 201 (2013) (describing Justice O'Connor as an "intentionalist-based theorist"); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 498 (2013); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277, 300 (1990).

125. *See* Barnhart v. Sigmon Coal Co., 534 U.S. 438, 462 (2002).

doctrine, which is generally viewed with suspicion among strong textualists.[126]

In contrast to Justice O'Connor, Justices Roberts and Alito are stauncher and more consistent textualists. In close cases, they are more likely to ascribe to reasoning consistent with the BA, than to something like Justice Breyer's moderate purposivism. In *McQuiggin v. Perkins*, for example, Justices Roberts and Alito joined Justices Scalia and Thomas dissenting to the Court's decision to permit an "actual innocence" exception to the statute of limitations of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), even though this judicially created exception pre-dated the Act.[127] Comparing AEDPA to a Swiss watch, Justice Scalia's dissent reasoned that "the intricate craftsmanship tells us that the designer arranged things just as he wanted them."[128] This is a variation on the "presumption of compromise" described above, which is buttressed by the BA. The dissent also relied on Separation of Powers concerns that come straight out of Manning's work. The dissent cited to Manning's influential 2001 article, "Textualism and the Equity of the Statute," on the history of separation of powers as relevant to courts' interpretive functions.[129] The dissent closely tracked the logic of Manning's article by referring to "the separation of the legislative and judicial powers" in prerevolutionary England as "incomplete," thus implying that a greater separation was intended under the American Constitution.[130] Manning's thesis in that article relies on the BA.[131] Moreover, the dissent cited to Manning's 2006 article, "What Divides Textualists from Purposivists," for its discussion on textualists' interpretive techniques.[132] It is hard not to glean, from these citations, an endorsement of Professor Manning's general theory of interpretation.

Further evidence of affinity for the BA among the Roberts Court's conservative wing can be found in Justice Alito's concurrence in the 2015 decision *Department of Transportation v. Association of American*

126. *See generally* Manning, *Absurdity*, *supra* note 10.

127. McQuiggin v. Perkins, 133 S. Ct. 1924, 1933 (2013).

128. *Id.* at 1939 (Scalia, J., dissenting).

129. *Id.* at 1941.

130. *Id.*; *see* Manning, *Equity*, *supra* note 8, at 27–101, 57 (comparing "English antecedents to 'the judicial Power'" with the American constitutional system and arguing that the "the U.S. Constitution rejected" the older English approach).

131. Manning, *Equity*, *supra* note 8, at 70–78.

132. *McQuiggin*, 133 S. Ct. at 1942 (citing Manning, *What Divides*, *supra* note 15, at 81–82 & n.42); In another concurrence he wrote on his own, Justice Thomas cited this same article specifically for its recitation of the Bargaining Argument. *See* Wyeth v. Levine, 555 U.S. 555, 601–02 (2009) (Thomas, J., concurring in the judgment).

Railroads.[133] There, Justice Alito cites to Manning's 2007 article "Lawmaking Made Easy," for the proposition that "bicameralism and presentment make lawmaking difficult by design."[134] This idea is closely connected to the BA's premise that the difficulty of passing legislation reflects the constitutional purpose to give political minorities the right to insist upon compromise as the price of assent.[135]

Perhaps the most direct evidence of the acceptance of the BA by the strong textualists on the Roberts Court is *Abramski v. United States*; a 2014 decision in which the Court was split 5-4 down predictable lines, with Justice Kennedy joining the Court's liberal wing in the majority.[136] The question in *Abramski* was whether the federal Gun Control Act of 1968 criminalizes misrepresentations by someone purchasing a firearm on someone else's behalf.[137] The defendant, Bruce Abramski, was legally eligible to purchase a gun.[138] He purchased the gun for his uncle, but falsely asserted on a form that he was the "actual transferee/buyer" of the gun.[139] Abramski was prosecuted for making a false statement material to the sale under the Act.[140] He argued that federal gun control law was only concerned with representations concerning the purchase eligibility of the person who directly receives the gun from the transferor, even if that person is acting as a "straw purchaser" (i.e., as an agent for someone else). Abramski therefore claimed that his false statement about whether he was the actual buyer could not be material to the sale under the Act.[141] As the majority opinion summarized this argument: "So long as the person at the counter is eligible to own a gun, the sale to him is legal under the statute."[142]

The majority rejected Abramski's position, holding that the buyer or "transferee" that the statute is concerned with is the ultimate buyer, not the straw purchaser or agent of the ultimate buyer. The majority conceded that "[f]ederal gun law regulates licensed dealers' transactions with 'persons' or 'transferees,' without specifically referencing straw purchasers."[143] But the

133. Dep't of Transp. v. Ass'n of American R.R., 135 S. Ct. 1225, 1237 (2015).

134. *Id.* at 1237 (Alito, J., concurring) (citing John F. Manning, *Lawmaking Made Easy*, 10 GREEN BAG 2D 202 (2007) [hereinafter Manning, *Lawmaking*]) (alteration and emphasis omitted).

135. *See* Manning, *Lawmaking*, *supra* note 134, at 200.

136. Abramski v. United States, 134 S. Ct. 2259 (2014).

137. *Id.* at 2263.

138. *Id.* at 2265–66.

139. *Id.* at 2265.

140. *Id.* at 2263.

141. *Id.* at 2266.

142. *Id.*

143. *Id.* at 2267.

Court concluded that, in the case of a straw purchase, the law "looks through the straw to the actual buyer."[144] The Court went on: "The overarching reason [for this interpretation] is that Abramski's reading would undermine—indeed for all important purposes, would virtually repeal—the gun law's core provisions."[145] The Court noted the primary purposes of the gun law scheme and reasoned that "no part of that scheme would work if the statute turned a blind eye to straw purchases" and instead addressed only the "empty formalit[y]" of who is standing at the counter handing over the money for the gun. The Court therefore read the plain language in light of its "context, structure, history, and purpose."[146]

Justice Scalia's dissent was joined by Justices Thomas, Alito, and Roberts. According to these dissenters, "[t]he majority's *purpose-based* arguments describe a statute Congress reasonably might have written, but not the statute it wrote."[147] After first arguing that the majority overstates the extent to which the law undermined the statute, the dissent provided a succinct distillation of the BA:

> [P]erhaps Congress drew the line where it did because the Gun Control Act, like many contentious pieces of legislation, was a 'compromise' among 'highly interested parties attempting to pull the provisions in different directions.' Perhaps those whose votes were needed for passage of the statute *wanted* a lawful purchaser to be able to use an agent.[148]

Two of the most fundamental elements of the argument can be found here: Specifically, a presumption of hidden compromise and reference to the possibility that this compromise might have been essential to the law's enactment. The passage also quotes *Barnhart*, the Court's leading exposition of the BA. *Abramski* vividly illustrates how the argument has become an important arrow in the quiver of justices opposed to reading statutory provisions in light of statutory purpose.

The majority in *Abramski* responded to this argument but largely missed the point. Conceding that the language in statutes is often the result of compromise, the majority nonetheless assumed that Congress made no such choice here, because the statute did not mention straw purchasers.[149]

144. *Id.*

145. *Id.*

146. *Id.* (citation and internal quotation marks omitted).

147. *Id.* at 2278 (Scalia, J., dissenting) (emphasis added).

148. *Id.* at 2280 (citing Barnhart v. Sigmon Coal Co., 554 U.S. 438, 461 (2002)).

149. *See id.* at 2271 (majority).

But this response elided the dissenters' argument that the lack of reference to straw purchasers may itself have been a hidden compromise; the existence of which should be presumed. The dissenters argued that, because this compromise *could* have been essential to the passage of the law, this compromise must be respected.

The examples above illustrate that, at least until the 2014 Term, textualists on the Roberts Court have drawn on the BA and on Manning's work in particular to rebut ostensibly purposivist arguments in statutory interpretation cases. In particular, the votes and opinions of Chief Justice Roberts and Justice Alito have been largely faithful to the BA.

Against this background, Chief Justice Roberts' majority opinion in *King*, which was joined by Justice Kennedy, came as a surprise. It was not so much the result that surprised but rather the extent to which the Court's reasoning stood at odds with the BA and in line with moderate purposivism. From a theoretical standpoint, the most notable part of the Court's opinion was its holding that policy context and structure may *create* ambiguity in a facially clear text.

A major difference between strong textualists and moderate purposivists is that the latter are more willing to consider policy context, including statutory structure, as evidence of ambiguity.[150] By contrast, textualism adopts a two-step inquiry. First, judges should rely only on semantic context to determine if the language is ambiguous. Second, if the language permits "more than one reasonable understanding," only then may the court consider evidence "of purpose from sources such as the overall tenor or structure of the statute, its title, or public knowledge of the problems that inspired its enactment."[151] So, while it is true that the textualist approach is contextual, it is only partly so.[152] Because the BA emphasizes the need to use language as a precise tool to enshrine hidden compromise, textualists will only consult direct semantic context to decide whether the statute is ambiguous. Semantic context may include limited structural evidence that bears directly on semantic meaning, such as the

150. *Compare, e.g.*, Koons Buick Pontiac GMC, Inc. v. Nigh, 432 U.S. 50, 65 (2004) (Stevens, J., concurring) ("[T]he Court has suggested that we should only look at legislative history for the purpose of resolving textual ambiguities or to avoid absurdities. It would be wiser to acknowledge that it is always appropriate to consider all available evidence of Congress's true intent."), *with* Nat'l Tax Credit Partners, L.P. v. Havlik, 20 F.3d 705, 707 (7th Cir. 1994) (Easterbrook, J.) ("Knowing the purpose behind a rule may help a court decode an ambiguous text, but first there must be some ambiguity.").

151. Manning, *What Divides*, *supra* note 15, at 85.

152. *See* King v. Burwell, 135 S. Ct. 2480, 2497 (2015) (Scalia, J., dissenting) ("Context always matters. Let us not forget, however, *why* context matters: It is a tool for understanding the terms of the law, not an excuse for rewriting them.").

position of a term within the statute,[153] but it does not encompass "the broader structure of the [law]."[154]

In *King*, by contrast, the majority wrote:

> Petitioners' arguments about the plain meaning of Section 36B are strong. But while the meaning of the phrase "an Exchange established by the State under [42 U. S. C. §18031]" may seem plain "when viewed in isolation," such a reading turns out to be "untenable in light of [the statute] as a whole."[155]

The citation to *ACF Industries* is telling. There, the Court held that a petitioner's reading of a statute, "while *plausible* when viewed in isolation . . . is untenable in light of [the statutory section] as a whole."[156] The *ACF Industries* holding was consistent with textualism, which allows structure and policy context to illuminate ambiguous provisions. The provision in *ACF Industries* was facially ambiguous, but the provision at issue in *King* was not, according to the majority. *King* therefore departed from textualist principles by using context to introduce ambiguity into language that the majority admitted was otherwise "plain" from a semantic standpoint. The majority was perfectly transparent in what it was doing: "In this instance, the context and structure of the Act compel us to depart from what would otherwise be the most natural reading of the pertinent statutory phrase."[157]

The Court in *King* relied on statutory purpose as part of the "context" relied upon to reach a decision. The Court wrote: "Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."[158] This is bluntly purposivist language. The Court also quoted a prior decision from the 1970s for the principle: "We cannot interpret federal statutes to negate their own stated purposes."[159] The Court reasoned that "the statutory scheme compels us to reject petitioners' interpretation because it would destabilize

153. *See* Util. Air Regulatory Grp. v. E.P.A., 134 S. Ct. 2427, 2441 (2014).

154. *King*, 135 S. Ct. at 2494 (citing Dep't of Revenue of Ore. v. ACF Indus., 510 U.S. 332, 343 (1994).

155. *Id.* at 2495.

156. *ACF Indus.*, 510 U.S. at 343 (emphasis added).

157. *King*, 135 S. Ct. at 2495.

158. *Id.* at 2496.

159. *Id.* at 2493 (quoting N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 419–20 (1973)).

the individual insurance market in any State with a Federal Exchange, and likely create the very 'death spirals' that Congress designed the Act to avoid."[160] In other words, Chief Justice Roberts' opinion relied on the highly anomalous results of the plain text reading to eliminate this reading: exactly what a strong form of the BA forbids. That said, *King* does not exactly amount to a repudiation of the BA. Rather, the Chief Justice's opinion merely allows for the presumption of compromise to be overcome where the plain text reading has the potential to *severely* undermine or "negate" the broader statutory scheme.

Justice Scalia's dissent, joined by Justices Thomas and Alito, did not expressly mention the BA, despite the D.C. Circuit's reliance on it. Nonetheless, the dissent drew its theoretical underpinnings from the argument. The dissent claimed that where the "natural and ordinary" meaning of the words points in only one direction, the Court should not rely on policy context to impose a different meaning.[161] It repeated the textualist principle that "statutory design and purpose matter only to the extent they help clarify an otherwise ambiguous provision."[162] It also emphasized that the "oddity" of this reading is not sufficient reason to depart from it.[163] The dissent claimed that the Court should not "rescue Congress from its drafting errors." Finally, the dissent alluded to the possibility of compromise by noting that "[n]o law pursues just one purpose at all costs, and no statutory scheme encompasses just one element."[164] As applied to the facts, the dissent suggested that the plain text reading could have been a balance between the twin goals of "enabling the Act's reforms to work *and* promoting state involvement in the Act's implementation."[165]

Taken together with other decisions, *King* revealed that there are at least three distinct positions with regard to preserving legislative compromise through statutory interpretation. First, there are likely four Justices (Justices Ginsburg, Breyer, Sotomayor, and Kagan) who would acknowledge that courts should generally respect compromise but also permit strong contextual evidence of legislative intent to modify the clear semantic meaning of the text. Second, there are two Justices (Justices Roberts and Kennedy) who presume in most cases that the plain text

160. *Id.* at 2492–93.

161. *Id.* at 2497 (Scalia, J., dissenting) (internal quotation marks and citation omitted).

162. *Id.* at 2502.

163. *Id.* at 2501.

164. *Id.* at 2504; *cf. Abramski*, 134 S. Ct. at 2278 ("But no law pursues its purpose at all costs, and the textual limitations upon a law's scope are equally a part of its purpose.") (citation and internal quotation marks omitted).

165. *Id.*

reflects compromise, even when the results are odd, *except* where the plain text would severely undermine the overall statutory scheme.[166] Third, there are three Justices (Justices Scalia, Thomas, and Alito), who ascribe to the full implications of the BA and hold that courts should only depart from the plain text when the results would be "absurd" or reflect an unmistakable drafting error.[167]

Finally, note that on the same day that the *King* opinion was released, the Court also handed down a decision in another statutory interpretation case, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*[168] There, the Chief Justice rejoined Justices Scalia, Thomas, and Alito in dissent over the proper interpretation of the Fair Housing Act. This dissent, authored by Justice Alito, manifests a strong presumption of compromise. Without direct evidence of a compromise over the disputed provision, the dissenters nonetheless argued that the provision had "all the hallmarks of a compromise" because it cut a middle course between competing policy positions reflected in the Act's legislative history. The four dissenters quoted *Wolverine* and insisted that the Court "must respect and give effect to these sorts of compromises."[169] Therefore, while *King* clarified an interesting and important division within the textualist camp, *Texas Department of Housing* reaffirms the centrality of the BA within the Roberts Court.

VI. A Critique of the Bargaining Argument

This Article has attempted to summarize and, to some extent, reconstruct the constitutional argument for textualism, which is based on the primacy of legislative compromise. The details of the argument are largely culled from the writings of John Manning, textualism's primary academic defender. At this point, I will shift to an evaluation of the merits of the BA; in particular, whether the argument justifies preserving hidden bargains, such as backroom deals, to the maximum extent possible.

We may begin by agreeing with a central premise of the argument: that the constitutional design promotes legislative compromise. It is well

166. Justices Roberts and Kennedy split in *Abramski*, but I read this split as reflecting differing views as to the extent to which the plain text would actually undermine the core purposes of the Gun Control Act. It also seems likely that Justice Kennedy has a lower threshold for concluding that statutory purposes would be undermined to such a degree that the plain text reading should be modified.

167. Note that Justice Scalia passed away very shortly before this Article went to print. If his successor is appointed by a Democratic president, it seems likely that the Court would be left with only two staunch textualists.

168. Tex. Dep't of Housing and Comty. Affairs v. Inclusive Comtys. Project, Inc., 135 S. Ct. 2507 (2015).

169. *Id.* at 2541 (Alito, J., dissenting).

known that the House of Representatives, the Senate, and the President are elected through different means, and for different terms. Each of these bodies represents a different constituency, with House members representing the most local and the President the most national. Bicameralism ensures that more local constituencies often have the power to block even legislation that garners widespread national support. We see this dynamic today concerning issues such as the legalization of marijuana, immigration reform, and climate change regulation. Though a majority of Americans support action on these issues, no law has been able to make it through the bicameralism process. Further, Article V's placement of equal Senate suffrage beyond the amendment process gives states with smaller populations an outsized vote on national issues. In this way, the Constitution unmistakably grants political minorities the power to hold up the legislative process.

Given that the constitutional design creates strong incentives for compromise, it is appropriate to adopt a general presumption of enforcing the statute as written without specific evidence of contrary intent. When the text of the statute directly and affirmatively resolves the case at hand, courts should not override it, even if the result is anomalous from the perspective of the statutory scheme. Moreover, where there is evidence that a particular provision was the result of a compromise, courts should adopt a strong presumption in favor of the literal text, lest the compromise be disturbed.

But what about where there the policy context suggests that the anomalous results of the plain text are the result, not of compromise, but of sloppy drafting? Here, textualism continues to counsel against reading the text in light of statutory purpose, even when the result is, if not downright absurd, at least very strange.

In the following sections, I argue that, when it comes to hidden compromise, the BA is missing a link. It explains how the constitutional design protects compromise, but it does not provide a compelling reason to preserve hypothetical hidden compromise. It does not justify a blanket and near-insurmountable presumption of compromise in every case of statutory incoherence.

A. Constitutional Textualism as a Prior Assumption

Manning's theory of statutory interpretation assumes a logically prior textualist theory of constitutional interpretation, which requires separate justification. We need not venture too far into this constitutional theory, except to say that it largely mirrors his theory of statutory interpretation. Manning advocates the "ordinary interpretation" of the Constitution, which treats the Constitution as if it were like a statute. He rejects the notion that

the Constitution is a fundamentally different kind of legal text from statutes that should be interpreted using different principles.

Under this method, where the Constitution speaks with specificity, courts should make the same presumption of compromise as with statutes.[170] But when it comes to defining more indeterminate provisions, like the phrase, "the judicial power," courts may fill in the gaps to "liquidate" the meaning of the Constitution.[171] When liquidating the text, courts should focus primarily on the same types of evidence of "original meaning" that textualism advocates for interpreting statutes, including structure and context.[172] In the case of "the judicial power," Manning arrives at the conclusion that this provision mandates statutory textualism primarily by making structural inferences from the constitutional design,[173] which entails reading "'[the judicial power]' in the light of surrounding constitutional terms."[174]

But even if drawing structural inferences may be an appropriate means of clarifying some open-ended constitutional provisions, it is far from obvious that "the judicial power" is a large enough peg on which to hang an entire theory of statutory interpretation. The Constitution does not specifically define this phrase and does not expressly mandate a particular interpretive approach.

Moreover, the inferences Manning draws do not speak loudly. As will be discussed in more detail below, the surrounding constitutional provisions that Manning wishes to read "the judicial power" in light of—bicameralism, Article V, and the Necessary and Proper Clause—manifest a *general* purpose of preserving minority rights and permitting Congress to define the manner and scope of legislation. But textualism is not the only interpretive method that remains faithful to these purposes. As explained below, the notion that surrounding constitutional provisions evince a more particular intent to presume legislative compromise in all cases of statutory incoherence involves an unjustifiably large inferential leap. The reason Manning must take this leap on the basis of indirect structural evidence is

170. John F. Manning, *The Eleventh Amendment and the Interpretation of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1716–17 (2004) [hereinafter Manning, *Eleventh Amendment*].

171. *Id.* at 1729.

172. *Id.* at 1729–30 (describing practical liquidation as consistent with constitutional textualism).

173. *See* Manning, *Separation*, *supra* note 54, at 2034 (describing structural inferences as "perhaps [the] most promising . . . way to lend determinacy to the vesting clauses"); *see also* Manning, *Eleventh Amendment*, *supra* note 170, at 1707 n.160 ("I rely on structural inferences from Article I, Section 7 and Articles V and VII to determine the appropriate content of 'the judicial Power' to declare the law applicable to a case or controversy.").

174. Manning, *Separation*, *supra* note 54, at 2034.

that his theory of constitutional interpretation rules out, as theoretically illegitimate, other less textualist means of liquidating broad constitutional clauses.

I do not mean to gainsay that sound reasons may exist for relying almost exclusively on structural inferences to liquidate "the judicial power." To evaluate these reasons here would take us too far afield into the theory of constitutional interpretation. I merely wish to highlight that the constitutional method Manning uses to arrive at the BA depends on an independent theory of constitutional interpretation. For the BA to succeed on its own terms, then, requires a theoretically separate justification of constitutional textualism. This justification must explain why the Constitution should not be treated differently from ordinary statutes.

B. Critique of the Maximalist Position

We can now move on to evaluate the BA more closely based on its internal logic, taking as given that structural inferences are an appropriate means of liquidating "the judicial power." As discussed, textualists rely on these inferences to support a presumption of compromise that maximizes the preservation of legislative compromise. The most notable feature of this "maximalist position" is that it mandates the preservation of hidden compromise, regardless of whether there exists any specific evidence of compromise. According to the BA, this empirical question should not concern us. What matters is that there was some *possibility* that the literal text was the result of compromise. If so, the Constitution is best read as requiring that courts err on the side of preserving as much compromise as possible. "[T]o do otherwise would be to dilute important, constitutionally ordained, as well as legislatively adopted, procedural safeguards that give political minorities extraordinary power to block legislative change and insist on compromise as the price of assent."[175]

But this argument leaves a theoretical gap that has not been filled in by textualism's defenders. Namely, if bicameralism already permits political minorities "extraordinary power" to hold legislation hostage, then, why is it necessary to interpret "the judicial power" in a way that gives minorities even *more* control on the back end, to undermine the purposes of legislation through hidden bargains? Manning argues that only a strong form of textualism will present the "dilution" of "procedural safeguards" that help minorities. But this point assumes the conclusion that the preservation of hidden compromise is the initial baseline set by the Constitution, which can either be preserved or "diluted."

175. Manning, *Second-Generation*, *supra* note 45, at 1314.

The structural inferences that support this conclusion are tenuous at best. It seems just as reasonable to suppose that the Constitution's specific and detailed designation of a legislative process (bicameralism and presentment) that protects minority rights is a textual indication that courts should not imply *additional* rights through structural reasoning.[176] From this perspective, the BA can be seen as bestowing a gratuitous power to enshrine textual compromises that conflict with contrary indicia of congressional intent that may be more probative than the semantic meaning in isolation.

Where the constitutional design indicates that the Framers already carefully crafted the means of protecting minority rights, courts should be wary of expanding these rights based on the purposes of other constitutional provisions (especially Article I, Sec. 7 and Article V) that do not directly speak to "the judicial power." Recall the textualist concern that compromise often "result[s] in a decision to go so far and not further."[177] Or, as Justice Scalia put it in *McQuiggin*, "the intricate craftsmanship tells us that the designer arranged things just as he wanted them."[178] If, as textualists often argue, the Constitution was itself the result of compromise, then perhaps the Framers did not intend to maximize minority power through legal interpretation. Perhaps, instead, the limits of minority power are prescribed through the carefully arranged express provisions of the constitutional text.

The likely textualist response to this argument is that because the Constitution clearly evinces the intent to set up procedural safeguards for minorities, courts should not rely on methods of statutory interpretation that directly undermine this design. Accepting this point as true, we may concede that it would be unacceptable for a court to override an *open* compromise. But when it comes to *hidden* compromise, the argument again begs the question: would courts' refusal to apply a presumption of hidden compromise actually undermine the rights of political minorities? The answer is either not at all or very little. Consider that, even if courts do not apply the presumption, political minorities would not thereby lose the power to insist upon compromise. Under bicameralism, legislation would still need to secure approval from both houses of Congress and the President. The same procedural safeguards that create a de facto "supermajority" requirement would still be in place.

176. By "structural reasoning" I mean the kind of specific text-based purposivism that is compatible with textualist methodology. "Structural inferences" are a kind of structural purposivist reasoning.

177. E. Associated Coal Corp. v. United Mine Workers of Am., Dist., 531 U.S. 57, 68–69 (2000) (Scalia, J., concurring).

178. McQuiggin v. Perkins, 133 S. Ct. 1924, 1939 (2013) (Scalia, J., dissenting).

Rather, all that would be lost if courts refused to presume compromise would be the ability to preserve bargains in one specific situation; namely, where: (1) there is no record or textual indication that the bargain occurred, (2) the substance of the bargain is not written clearly into the statute,[179] *and* (3) the bargain creates substantial awkwardness or incoherence in relation to the statute as a whole. All three of these conditions would have to be met before a court could reasonably conclude that the awkward implications of the plain text are the likely result of inadvertence or error on the part of drafters.

It is therefore not clear how or why a court's refusal to presume compromise in *every* case of statutory incoherence would actually "undermine" the purposes of bicameralism and other constitutional provisions. Erasing a hidden compromise does not directly interfere with or detract from the operation of any other provision of the Constitution. It does not cause political minorities to *lose* any of the power that express provisions of the Constitution afford them. Rather, it merely deprives them of the right to create statutory incoherence in secret, rather than out in the open. Manning considerably overstates his case by suggesting that the safeguards that the Constitution provides for political minorities would be "threaten[ed]" if courts fail to zealously preserve hidden textual compromises.[180]

To the contrary, the maximalist position creates a risk of swinging the pendulum too far in the direction of protecting minority rights. In the present era of partisan and special interest gridlock, it would be hard to deny that political minorities wield an enormous amount of power in government. The provision of two senators per state means that a minority party can achieve a sizable legislative majority despite representing a significant minority of citizens.[181] Furthermore, legislatively adopted political maneuvers like the Senate filibuster and the gerrymandering of House districts give political minorities even greater power to insist on compromise.[182] It would be difficult to claim that the political system

179. I want to be careful to distinguish the "substance" of the bargain from its "existence." By "substance" I am not talking about the fact that bargaining took place. Rather, I am talking about the product of the bargain: its intended results. As discussed below, I assume, despite the inherent vagaries of language, it is almost always possible for legislators to use language to make clear the intended result in a certain specific circumstance, if that circumstance is the subject of compromise.

180. *See* Manning, *Eleventh Amendment*, *supra* note 170, at 1694.

181. Dylan Matthews, *The Senate's 46 Democrats got 20 million more votes than its 54 Republicans*, VOX (Jan. 3, 2015), http://www.vox.com/2015/1/3/7482635/senate-small-states.

182. *See, e.g.*, Aaron Blake, *Democratic House candidates winning the popular vote, despite big GOP majority*, WASH. POST, (Nov. 9, 2012), https://www.washingtonpost.com/news/the-fix/wp/2012/11/09/democratic-house-candidates-winning-the-popular-vote-despite-big-gop-major

created by the Constitution provides any dearth of opportunities for political minorities to hold legislation hostage. However, the maximalist position entails a view that, because the real-world effects of the constitutional design give so much power to political minorities, other provisions of the text should be interpreted to bestow even more power. Logic does not require this result.

ity/; Burgess Everett, *Democrats Learn to Love the Filibuster*, POLITICO, (Feb. 3, 2015), http://www.politico.com/story/2015/02/senate-democrats-filibuster-114888.

Conditions Under Which a Presumption of Compromise Is Necessary to Preserve Legislative Compromise

1. The compromise is hidden (otherwise intent to compromise is clear).

AND

2. The plain text does not affirmatively answer the interpretive question (otherwise there is no possible alternative reading).

AND

3. The policy context conflicts with the semantic context (otherwise there is no reason to depart from semantic meaning).

Example 1: In *Sigmon Coal*, there was no evidence of a compromise over disputed provision (1.), the plain text did not affirmatively exempt successors of signatory operations (2.), and successors of signatory operators bear a closer relationship to retired workers of signatory operators than successors to "related persons" to the signatory operator (3.).

Example 2: In *King*, there was no evidence of a compromise over disputed provision (1.), the plain text did not affirmatively exclude federally-established exchanges from subsidies (2.), and this exclusion would severely undermine the stated purpose of the legislation for no apparent reason (3.).

C. The Plain Text as a Necessary Legislative Tool

Even if sweeping away hidden compromise would not directly undermine the exercise of minority rights protected in other express provisions of the Constitution, Manning has another argument for why textualism nonetheless serves an essential role in the constitutional design. He writes that "Semantic meaning provides the most, if not the only, reliable means by which legislators can express the relevant limits on how far they are willing to go."[183] Conversely, "if one were to give background purpose priority over semantic detail, then it would be quite difficult to fathom how a legislator with the power to exact a compromise could bargain reliably for any particular outcome."[184] This is a kind of the-

183. Manning, *Competing Presumptions*, *supra* note 113, at 2040.

184. *Id.*

greater-power-implies-the-lesser argument. The greater power is the allocation of political power to give political minorities the right to hold legislation hostage. The lesser power is the ability to use that leverage to create textual compromises that can be enshrined in the plain text of legislation.

But is preserving hidden bargains really "necessary" to effectively record compromise, as Manning claims?[185] Take *Barnart v. Sigmon Coal* as an example. Assume that coal companies had successfully lobbied a powerful minority of lawmakers to exclude successors of signatory operators from the part of the statute concerning the assignment of retirement benefits. Assume further that this lobbying occurred behind closed doors, with no record either of the fact that it took place, or of the resulting compromise. Without the support of the lawmakers in question, the Coal Act would not have been passed. On the other hand, the exclusion of successors to signatory operators flies in the face of the statute's purpose to identify the persons "most responsible for plan liabilities," and sits incongruously with the express reference to successors of related persons.

If the case had come out the other way, and the Supreme Court had concluded that the statutory incongruity was an inadvertent oversight and upheld the Commissioner's interpretation on that basis, to what extent would lawmakers have lost the *capacity* to compromise? Certainly one avenue for recording compromise would be lost—that of omitting reference to the successors. But this was not the only, and certainly not the clearest, method of recording the hypothetical compromise in *Sigmon*. Lawmakers could have written the law to expressly state that, "successors of signatory operators *shall not*" be responsible for plan liabilities. This would have been a much more direct and unambiguous[186] path to the intended result than the omission of any reference to signatory operator successors. If successor liability had actually been bargained for, it is highly likely that bargainers would have insisted upon the clearest possible language to enshrine the compromise, *unless* either: (1) the bargainers wanted the existence of an actual compromise to remain hidden; or (2) they believed (unreasonably) the "omission" approach was so clear that courts could not fail to recognize it.

In fact, in virtually any situation where the BA could be dispositive, it will have been possible to enshrine the hidden compromise more clearly.

185. *Id.* at 2038.

186. Courts and scholars speak as though ambiguity is an either/or proposition, and in a legal sense this is true: At a certain point, courts treat marginally ambiguous statutes as being "clear." But the reality is that ambiguity is by definition a matter of degree, and language can be more or less ambiguous. The direct statement that successors will not be liable is obviously the least ambiguous legal statement that will produce this effect.

Therefore, the presumption of compromise is not strictly *necessary* for legislators to effectively record compromise.[187] At most, textualism would be necessary to keep the existence of legislative bargains—horse-trading—completely hidden from the public.

Even if not strictly necessary, one could argue that textualism makes it significantly easier for "Congress to use its words to draw . . . awkward, uneven, and overinclusive lines."[188] That is, if courts sometimes read statutes in light of contrary indicia of intent from the policy context, legislators may need to draft with greater specificity and clarity in order to enshrine awkward compromises. For example, if a particular outcome is important to lawmakers, it may be necessary for drafters to address the issue point blank, rather than, say, through the operation of a canon of construction or through negative implication.

Fortunately, it is not difficult to use language to convey the intent of a legislative compromise. To see why this is so requires bringing out an important assumption in my argument: The ultimate goal of any legislative compromise is to produce particular *results*, and not merely the incorporation of language into the statute for its own sake. Because lawmaking is a purposive enterprise, lawmakers always have real-world ends in mind. These ends may be envisioned with more or less specificity by legislators, but in legal cases involving a potential compromise, a court's focus should always be on whether Congress specifically intended the result that a plain-text reading would produce in the case at bar. Therefore, so long as it is possible to linguistically frame the subject matter of the "case or controversy," it will have been possible for lawmakers to use language to directly address the issue at hand.

Consider the famous case of *Church of the Holy Trinity v. United States*, a classic example of a robust purposivism.[189] Manning has argued that the relevant provision there, a broad statutory prohibition on assistance for foreign citizens to migrate to the United States to perform "labor or service of any kind," could have been a compromise. He has written: "Perhaps crucial elements of the enacting coalition preferred a broader prohibition than the commonly held purpose [addressing the problem of "cheap unskilled labor"] would support."[190] Moreover: "If, as in *Holy Trinity*, the Court applies a judge-made presumption that the drafters

187. "Effectively" refers to the capacity to have the compromise enforced by courts.

188. Manning, *Constitutional Power*, *supra* note 9, at 67.

189. Church of the Holy Trinity v. United States, 143 U.S. 457, 472 (1892). Because of its canonical status, I do not recount the facts here. Moreover, though I use the facts of the case for exemplary purposes, I do not mean to provide a complete defense to the Court's holding, a subject on which I am agnostic.

190. Manning, *Constitutional Power*, *supra* note 9, at 21–22.

misspoke, then Congress cannot reliably use broad language to adopt an encompassing rule or to strike an imperfect compromise, at least when doing so introduces problems of means-ends fit (as is typically the case)."[191]

However, this conclusion may not be correct even as applied to *Holy Trinity*. Let us assume that there was in fact a legislative compromise for the phrase "labor or service of any kind" to encompass skilled and intellectual work.[192] In this event, the hypothetical compromise still did not speak directly and affirmatively with regard to the question presented in the case: whether the prohibition was meant to sweep up one particular, unusual "profession": religious clergy. Exempting clergy from the statutory prohibition does not undo the more general compromise Manning hypothesizes. Only if the Court had reached beyond the facts of the case to exempt *all* skilled labor would the statute have undone the hypothesized compromise.[193] By contrast, the only compromise the Court's holding may have actually erased would have concerned clergy in particular. If this minor and extraordinary circumstance was important to the "enacting coalition," however, the law's drafters could have directly addressed it through various means, such as a provision that: "Service of a religious nature shall not be exempted from the definition of 'labor or service.'" That Congress did not include such a provision indicates that clergy were likely not a sticking point in the drafting process, even if the plain text suggests that other, more conventional forms of skilled labor may have been. The lesson from *Holy Trinity* is that if an otherwise incongruous result is important enough for lawmakers to make it a focus of the legislative process, an interpreter would expect that Congress would specifically address the issue in the statute.

One could object here that it would be onerous for courts to require Congress to spell out legislative compromises in detail. Instead, Congress should be able to effectively choose more indirect means to achieve a result, such as negative implication, so long as the bare words of the statute (in semantic context) would be facially clear to a reasonable speaker

191. *Id.* at 22.

192. In fact, there is a strong textual argument for this conclusion, even from a purposivist perspective.

193. Though there is not space to devote to the topic, I disagree with commentators who believe the holding of *Holy Trinity* excluded all skilled and intellectual labor from the statute's ambit. I believe close attention to the language reveals that the "religious nation" part of the opinion, rather than being a narrower alternative ground is actually essential to the narrow holding that clergy are exempted. *See*, *e.g.*, Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1842 (1998). But even if the "broad" reading of *Holy Trinity* is correct, the Court *could* and, in that event, *should* have chosen the narrower ground that I posit here as more theoretically defensible.

familiar with relevant linguistic conventions. But this objection loses sight of the practical motivation behind legislative compromise, which is to ensure that the intended results are actually realized. If compromise centers on intended results, and if those results are important enough for legislators to seek to use statutory language to produce them, why would any reasonable legislator use less-than-direct language to do so?

For example, if the authors of the ACA's subsidy provisions intended to exclude insurance purchased on federally established exchanges from subsidies, why would Congress have "used such a winding path of connect-the-dots provisions"[194] to "translate its policy precisely into law,"[195] rather than coming right out with it? The "connect-the-dots" approach is not how people typically use language to convey intentions, and courts should be able to take this reality into account. As Chief Justice Roberts wrote, "Had Congress meant to limit tax credits to State Exchanges, it likely would have done so in the definition of 'applicable taxpayer' or in some other prominent manner."[196] But the anomaly of using an indirect method to produce such a consequential result only becomes clear by considering broader statutory context and purposes, which textualism forbids if the language is semantically clear. I am not suggesting that Congress must use the *most* direct means of achieving a particular legislative outcome; only that courts should be able to consider the indirectness of the means of achieving that outcome as evidence weighing against the likelihood that compromise occurred.

From the discussion above, it is clear that courts must abide by two general interpretative principles in order for legislators to be able to reliably record compromises. First, courts must respect open compromises where they occur, and generally weigh any specific evidence of compromise. For example, when the statute or legislative history indicates that a particular provision was the subject of a compromise, courts should strictly construe that provision. Second, courts must never deviate from plain language that speaks *directly* and *affirmatively* to the interpretive issue.[197] By "directly and affirmatively," I mean that the text actually addresses the precise interpretive issue, such that an interpreter need only read the relevant text to know the intended result for the case at bar. It should be noted that, as with pretty much everything in statutory interpretation, the extent to which a text provides a "direct and affirmative" answer to an interpretive issue is

194. King v. Burwell, 135 S. Ct. 2480, 2495 (2015).

195. Manning, *Constitutional Power*, *supra* note 9, at 71.

196. *King*, 135 S. Ct. at 2495.

197. *Cf. Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 (2014) ("[T]his Court has no roving license, in even ordinary cases of statutory interpretation, to disregard clear language simply on the view that . . . Congress 'must have intended' something broader.").

a matter of degree. The point is that courts must respect language that appears to directly contemplate the facts posed in a case, such that the semantic evidence outweighs even strong contrary evidence of intent from the policy context.

If courts abide by these two principles, then legislators will be able to reliably use the plain text of the statute to enshrine legislative compromise. The preservation of hidden compromise is not strictly necessary to achieve this goal. Therefore, a presumption of compromise is not essential for compromise to be enforced by courts.

D. Transparency as a Competing Structural Inference

We have seen how the Bargaining Argument proceeds from structural inferences drawn from surrounding constitutional provisions, particularly Article I, Section 7 and Article V. But the argument also does not take into account an important competing inference, that the constitutional design evinces the intent to privilege legislative transparency. This competing inference is inconsistent with the maximalist position.[198]

At least four parts of the constitutional text support a constitutional preference for transparency: the general provision of a republican form of government, bicameralism, the Speech and Debate Clause, and the Journal Clause. Together, this constellation of textual provisions permits the inference that secrecy in the legislative process should be permitted but not privileged in the way textualism directs.

We can start with the obvious: the Constitution provides for a representative and republican form of government.[199] Indeed, the very word "republic" comes from the Latin *res* ("thing", "entity") and *publicus* ("of the people"). Ours is not a direct democracy, but the preamble to the Constitution tells us that it is a government "ordain[ed] and establish[ed]" by "We the People." This language clearly suggests the intent for ultimate citizen oversight of government. In order for citizens to receive effective representation under this system, they must be able to evaluate the votes and decisions of their representatives.[200] A blanket presumption of hidden

198. Note that I am arguing here from *within* the context of constitutional textualism, though I do not concede this to be the best mode of constitutional interpretation. To the extent to which the analysis in this section seems strained, my point is merely that the transparency inference is no less strained than the "minority rights" inference underlying the BA.

199. *Cf.* THE FEDERALIST NO. 57 (James Madison) ("The elective mode of obtaining rulers is the characteristic policy of republican government.").

200. *Cf.* THE FEDERALIST NO. 52 (James Madison) ("As it is essential to liberty that the government in general should have a common interest with the people, so it is particularly essential that the [House of Representatives] should have an immediate dependence on, and an intimate sympathy with, the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.").

compromise undermines this system by privileging secret bargains over what legislators represent to the public that they are actually doing.

Second, as Manning notes, bicameralism requires that legislation gain the acceptance of lawmakers representing three distinct constituencies. It is true that the legislative process results in a de facto supermajority requirement for legislation. But bicameralism also plainly provides for a broader public and private airing of the law by providing for separate deliberative "moments" by each actor in the lawmaking process. I assume here that the deliberative purposes of bicameralism are furthered in proportion to the extent that the three actors have shared understandings about the effects of the bill. This assumption dovetails with the Madisonian theory of faction. For example, in Federalist 62, Madison wrote that bicameralism "doubles the security to the people, by requiring the *concurrence* of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one, would otherwise be sufficient"[201] From a more positive standpoint, allowing legislation to be "vetted" by separate bodies renders it more likely that unwise, erroneous, or unintended provisions will be corrected.[202] But the vetting process will not function perfectly unless legislative actors both agree on the relevant "semantic context" used to interpret the statute, *and* have the time and resources to think through the implications of "background conventions" (like canons of construction) that may be applied rigidly by a court. Unless these unrealistic conditions are met,[203] it is likely that drafting errors will "slip" through the cracks of the multi-body deliberative process. As a result, the version of the statute imposed by courts relying on semantic evidence may be quite different from the version each of these actors thought they were passing. The damage this result would have for the deliberative purposes of bicameralism should be weighed against the benefits to the constitutional structure of supporting political minorities' ability to forge hidden compromise.

201. THE FEDERALIST NO. 62 (James Madison) (emphasis added).

202. *See* ROBERT HISLOPE & ANTHONY MUGHAN, INTRODUCTION TO COMPARATIVE POLITICS: THE STATE AND ITS CHALLENGES 112–13 (2012) (describing the "redundancy" rationale for bicameralism and tracing some of its history); THE FEDERALIST NO. 62 (James Madison) (arguing that a Senate would help the legislature "escape a variety of important errors in the exercise of their legislative trust" owing to a lack of practical wisdom by representatives).

203. *See* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation-and the Irreducible Roles of Values Judgments Within Both*, 99 CORNELL L. REV. 685, 709–10 (2014) [hereinafter Fallon, *Three Symmetries*] (describing as "unworkable" the suggestion that the background linguistic conventions that largely compromise semantic context can be "reduced to a determinate list of rules set out in advance").

Third, the Constitution expressly anticipates that legislation will be aired through "Speech or Debate" in both houses of Congress.[204] As recounted by Justice Harlan in one of the few Supreme Court decisions concerning the Speech or Debate Clause, the clause was approved "without discussion and without opposition."[205] It was adapted from an earlier formulation in the Articles of Confederation, which read: "'Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress . . . .'"[206] This language, in turn, descended from the English Bill of Rights, which read: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."[207] By protecting legislators for what they say, the Speech or Debate Clause emphasizes the centrality and importance of open debate in the legislative process. An obvious purpose of protecting freedom of speech and debate in Congress is to encourage direct and candid discussion of legislation.

Fourth, the Constitution expressly provides for the publication of votes and proceedings. Article I, Section 5, the Journal Clause, states: "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal." The Constitution therefore assumes that the substance of congressional proceedings, including lawmakers' votes, should generally be available to the public. Of course, the Journal Clause does not require making lawmakers' private discussions and backroom negotiating public. But it does weigh against privileging surreptitiousness, by setting open proceedings as the default, with "Secrecy" reserved for special circumstances.[208] Moreover, the bar for recording the votes of each member is set quite low—"one fifth of those Present." This figure is "the lowest fraction to appear anywhere in the Constitution."[209] It allows a small minority to force transparency on the entire chamber—another clear

204. U.S. CONST. art. III, § 6 (stating that lawmakers shall be privileged from arrest or questioning relating to various congressional duties including speech or debate).

205. United States v. Johnson, 383 U.S. 169, 177 (1966) (citing V Elliot's Debates 406 (1836 ed.) and II Records of the Federal Convention 246 (Farrand ed. 1911)).

206. *Id.* (quoting ARTICLES OF CONFEDERATION of 1781, art. V).

207. *Id.* at 178 (quoting 1 W. & M., Sess. 2, c. 2.).

208. This is the same kind of structural inference favored by Manning for liquidating broad constitutional terms. *Cf.* Adrian Vermeule, *The Constitutional Law of Congressional Procedure*, 71 U. CHI. L. REV. 361, 410–11 (2004) [hereinafter Vermuele, *Congressional Procedure*].

209. Chesa Boudin, *Publius and the Petition: Doe v. Reed and the History of Anonymous Speech*, 120 YALE L.J. 2140, 2161 (2011).

preference for openness over secrecy.[210] Finally, this textual provision dovetails with the historical practice of opening House and Senate proceedings to the public. To wit, "[t]he House opened its doors to the public from the start, and the Senate followed by the mid-1790s."[211] Professor Vermeule has argued that "framers who advocated mandatory transparency of congressional deliberation and voting did so with the explicit recognition that encoding transparency in the constitutional bargain would help to dispel antifederalist concerns about the power of the new national government."[212] Further, these initial steps toward transparency were "in broad historical compass a recent design innovation" that brought about even more transparency "through voluntary legislative action" due to their early popularity with voters.[213]

The constitutional preference for legislative transparency and open debate therefore seems at least as well supported as the intent to allow political minorities to insist upon compromise that serves the primary basis for the BA. Preserving hidden compromise where the policy context suggests a contrary legislative intent undermines this competing constitutional value.[214] Therefore, even if we use the structural inferences method to liquidate the judicial vesting clause, the opposing constitutional preference for transparency weighs against reading "the judicial power" to permit and even encourage lawmakers to hide crucial details concerning the legislative process. This concern seems especially pressing when the actual *content* of the legislation, in the textualist sense of semantic meaning, may be effectively concealed during the legislative process by using a "poison pill" approach. For example, clever legislators trying to secretly undermine the intended results of legislation could insert a seemingly innocuous phrase that will throw a large wrench into a complex and finely calibrated statutory scheme. In the case of hidden compromise, the constitutional preference for transparency pushes back against and may outweigh the competing preference for compromise that undergirds the BA.

E. The Literalism Trap

My final criticism is not new, but it takes on added force in light of this presentation of the theoretical foundations of the BA. It is that the

210. *Cf.* Vermeule, *Congressional Procedure*, *supra* note 208, at 421 ("[M]andated transparency also enhances the monitoring of bargains between legislators and other actors.").

211. *Id.* (citing DANIEL N. HOFFMAN, GOVERNMENTAL SECRECY AND THE FOUNDING FATHERS: A STUDY IN CONSTITUTIONAL CONTROLS 24–29, 48–49, 55–61 (1981)).

212. *Id.* at 415.

213. *Id.*

214. Indeed, the BA may *actually* undermine this purpose, in contrast to the problematic claim, criticized above, that correcting unintended statutory incoherence undermines the minority's right to insist on compromise during the legislative process.

logic of the argument pushes courts toward application of the literal text at the expense of other probative indicia congressional intent.[215]

Manning takes pains to contrast modern textualism with the "literalism" of the older "plain meaning" school.[216] But Manning's conception of "literalism" is cramped. He equates the "literal" meaning with the dictionary definition.[217] Adopting this conception, he can then argue that modern textualism is "contextual" rather than literalistic, because it accounts for linguistic "nuances and conventions" that do not appear in dictionaries, including "background legal conventions."[218] At the same time, the "semantic context" used to determine whether statutory language is clear is limited to "evidence about the way a reasonable person conversant with relevant social and linguistic practices would have used the words."[219] It is only if the language is *semantically* unclear in context that textualists will declare the statute ambiguous.[220] Thus:

> When contextual evidence of semantic usage points decisively in one direction, that evidence takes priority over contextual evidence that relates to questions of policy. The latter category includes matters such as public knowledge of the mischief the lawmakers sought to address; the way competing interpretations of a discrete statutory provision fit with the policy reflected in the statute's preamble, title, or overall structure; and the way alternative readings of the statute fit with the policy expressed in similar statutes.[221]

In other words, "contextual evidence that relates to questions of policy" should only be considered when the statute is ambiguous.[222]

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215. *See generally, e.g.*, Abner S. Greene, *The Missing Step of Textualism*, 74 FORDHAM L. REV. 1913 (2006).

216. Manning, *Absurdity*, *supra* note 10, at 2456.

217. *See id.* at 2456, 2393.

218. *Id.* at 2458, 2465–66.

219. Manning, *What Divides*, *supra* note 15, at 91.

220. *Id.* at 92–93.

221. *Id.* at 93.

222. As Richard Fallon has suggested, without "algorithmic prescriptions regarding the content of interpretive contexts," the point at which a "reasonable interpreter" would declare the language of the statute to be "decisively" clear will often involve normative value judgments. *See* Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—And the Irreducible Roles of Values Judgments Within Both*, 99 CORNELL L. REV. 685, 712–13, 692 & n.40 (2014).

If we define literalism as strict adherence to the dictionary, the textualist approach is not literalistic. But the BA may foster a different and only slightly less rigid form of literalism: sticking with the plain language of the statute, considered in linguistic isolation, even when there is strong contrary evidence of congressional intent from other sources.[223] This literalism follows from the presumption that lawmakers have bargained over every word of the statute. Under the BA, it is the bare *language* and not the *effects* of the language that forms the locus of compromise.[224] But if the presumption of hidden compromise is unsupported, as I have argued, then textualism may inappropriately cordon off the initial inquiry into whether the statute is ambiguous by ruling out sources of ambiguity outside semantic context.

VII. Outlining an Alternative to the Bargaining Argument

This Article claims that the BA is undertheorized, even from a textualist perspective, when it comes to the justification for the maximalist position. In particular, strong textualists have not adequately explained why courts should provide significant additional powers for political minorities to block legislation, in addition to the extensive powers already provided for through express constitutional provisions. Nor have they explained why it is *necessary* for courts to adopt a blanket presumption of compromise in order for lawmakers to effectively record compromise. In this part, I briefly sketch a potential alternative to the BA and explain why it is not foreclosed by the arguments that textualists have presented thus far.

Under any faithful agency theory, Congress should have the ability to preserve even compromises that contravene the statute's overriding purpose. The reasons are so obvious as to require little elaboration. Namely, Congress is supposed to make the laws and is, therefore, the body responsible for balancing competing goals and political interests. Surely the BA proves at least this much: the constitutionally ordained legislative process seems designed to produce compromise, so courts should not set about undoing open compromise to further the broad purposes of a statute.

223. I am not talking about reading the statute in a way that simply disregards the plain text to further its broad remedial purposes. Rather, I am referring to the use of specific indicia of purpose from the text or structure of the statute, or other sources like legislative history, to determine "how the enacting legislature would have decided the interpretive question facing the court." Redish & Chung, *Democratic Theory*, *supra* note 28, at 813 (1994). This has been described as "intentionalism." *See id.* But I also refer to it as "moderate purposivism" in order to draw a distinction with new textualism. *See* Richard H. Fallon, *The Irreducible Roles of Values and Judgment within Textualist as Well as Purposivist Theories of Statutory Interpretation*, Harvard Law School Faculty Workshop, at 1 n.4 (2013) (subsuming "intentionalism" under the rubric of purposivism).

224. *See* Manning, *What Divides*, *supra* note 15, at 105–06.

In Part VI.C., I suggested that courts must abide by two principles to ensure that Congress may effectively preserve the so-called "half a loaf" compromises, concessions to political reality that produce apparent statutory incoherence or incongruity. First, courts must respect open compromise and consider specific evidence of compromise. Second, courts must never contravene the direct and affirmative meaning of the text; that is, clear language that provides a straightforward answer to the issue raised in the case.

Beyond that, the BA does not justify the maximalist position toward preserving hidden compromise. The fact that the absurd or implausible implications of the plain meaning *might* have been some kind of cloakroom bargain should not compel courts to presume that a bargain took place. As discussed, structural inferences from the Constitution cannot do the theoretical work to support this conclusion. There is simply not enough information contained in the text and structure of the Constitution to decisively support any specific interpretive theory. Manning's theory of "clause-based structural inferences" as applied to the phrase "the judicial power" has an apparent appeal because of its subtlety and, for lack of a better word, its tidiness—its promise of an answer to a thorny question without having to look (very far) outside the constitutional text. But given its unsatisfying logic under close scrutiny, it does seem prudent to look further afield for answers.

If we begin from the premise that courts are to be the faithful agents of Congress when interpreting statutes, we may be left with an exercise in practical wisdom: what principles of interpretation, in practice, are most likely to capture the likely intent of legislators who enacted the law? A messy exercise, to be sure, but messiness does not seem to be a strong argument against undertaking it, in the absence of more explicit constitutional guidance.

There is a balance to be struck between adhering to the plain text of a statute and avoiding a suffocating literalism that needlessly undercuts the statute's known purposes. Unfortunately, a blanket presumption of compromise will likely produce the second result. Professor Victoria Nourse has identified a "supermajoritarian difficulty" with textualism, which is that it "may reproduce the effects of a filibuster rule by means of statutory interpretation."[225] This concern applies with particular force to the BA. By turning every phrase and word of a statute into a potentially decisive exercise of a political minority's power, the argument "may enshrine in law that which is directly contrary to the will not only of a

225. *See* Victoria Nourse, *Misunderstanding Congress: Statutory Interpretation, the Supermajoritarian Difficulty, and the Separation of Powers*, 99 GEO. L.J. 1119, 1164 (2011).

majority but [of] a supermajority."[226] Not only may the BA tip the scales excessively toward political minorities, but it may also create a result that *no* lawmaker—not even the staunchest opponents of a law—intended. The risks of presuming compromise are potentially great.

A hidden compromise, as we have defined it, is a compromise that is never disclosed to the public in any way. It is worth considering, as a practical matter, whether the text, design, and purposes of the Constitution support placing such a high premium on horse-trading behind closed doors, at the risk of mangling a statute by failing to correct an inadvertent oversight or drafting error. On the one hand, nothing in the Constitution forbids secret legislative bargains, which have probably been around for as long as there were legislatures. It is unlikely much could get done at all without the ability to negotiate and draft bills behind closed doors. On the other hand, the BA holds that courts must go out of their way—and often out of the way of common sense—to preserve merely notional backroom deals.

Chief Justice Roberts, quoting his predecessor, has written that the Framers were "practical statesmen" and not metaphysical philosophers.[227] True enough. In this light, practical considerations about how to further congressional intent should be weighed in the balance. First and foremost is the fact that ours is a representative democracy, in which voters have the right to select who will represent their interests in the federal government. It would undermine the process of faithful representation to structure statutory interpretation around hidden compromise, because the more lawmakers are encouraged to strike secret deals, the more difficult it becomes for voters to evaluate the quality of their representation as agents of the citizenry.[228] James Wilson famously argued this agency principle at the Constitutional Convention, stating, "[t]he people have a right to know what their Agents are doing or have done, and it should not be in the option of the Legislature to conceal their proceedings."[229] By declining to privilege hidden compromise in the manner textualists suggest, courts would force lawmakers to either expressly draw the boundaries of an awkward compromise (i.e., "insurance purchased on federally-established exchanges shall not be eligible for subsidies") or otherwise record that compromise occurred through the text or legislative history.

226. *Id.*

227. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2589 (2012).

228. For a more detailed criticism of Manning's theory from a civic republican perspective, see Glen Staszewski, *Avoiding Absurdity*, 81 IND. L.J. 1001, 1018–22 (2006).

229. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 260 (Max Farrand ed., Yale Univ. Press vol. 2 1911).

A. Forcing Legislative Choice

Because the practice is not forbidden by the Constitution, lawmakers should have the ability to forge hidden compromise. But the system of representative democracy created through the Constitution's express provisions militates toward forcing representatives to make a choice. *Either* they can embed a compromise in the text with such subtlety that it looks like it could be a drafting error or inadvertent oversight, and risk having a court correct the apparent error to further congressional intent *or* they must put courts on notice that the bargain was intentional by turning it into an *open* compromise. Either disguise or disclose. Under this view, lawmakers would lose none of their drafting powers, but only the capacity to conceal a textual compromise from the public. The public, in turn, would gain informational power needed to evaluate the awkward compromises forged by those elected to represent them.

This approach contains two important assumptions, which follow from the discussion above. First, it is not difficult to clearly define the contours of a compromise using language, at least to the extent that the compromise anticipates specific expected applications of a statute, such as might appear in a legal case.[230] Second, it is, in fact, possible for legislators to disclose the existence of compromise, particularly through legislative history.[231]

To see how this either/or approach would look in practice, consider once more *King v. Burwell*. Suppose that lawmakers did forge a hidden compromise to prevent federally established exchanges from receiving tax subsidies. If so, the manner in which this result was to be achieved in the statute—by using the term "Exchange established by the State" in the subsidy provisions—was suspiciously roundabout and indirect. (Even putting aside whether this meaning was "plain.") What is more, the lawmakers responsible for this compromise should have known that the exclusion of insurance bought on federal exchanges would look highly incongruous both to the public and to courts, given the stated purposes of the law. There is no obvious reason to distinguish between the two types of exchanges, even if it is possible for courts to dream up a rational basis for doing so. And there is no evidence of a compromise in legislative history or anywhere else. What is clear is that barring the federal government from subsidies severely undermines the central goal of reducing the number of insured nationwide. Given that this drastic result is hidden in the fine print of an enormous law, an interpreter could certainly conclude that there is a reasonable-to-strong probability that the literal wording was merely the

230. *See* Part VI.C.

231. See examples of open compromise described above in Part IV.A.2.

product of sloppy drafting.[232] Lawmakers involved in the compromise were, therefore, on notice that their bargain was potentially liable to be swept out of the bill under standard interpretive principles set by the Court, including the Court's textualists, to read statutes in light of their "language, structure, context, history, and such other factors as typically help courts determine a statute's objectives."[233]

The interpretive issue in cases like *King*, *Barnhart*, and *Abramski*, boils down to who should bear the burden of statutory clarity. Particularly, when a statute is large and complex, like the Affordable Care Act, the Gun Control Act, the Coal Act, and many other statutes designed to address complicated issues, it is impractical to put the onus on all the lawmakers who voted for the law to catch all of its potential drafting flaws, including potentially anomalous results created by the interactions of different provisions that only a lawyer going through the bill with a fine-tooth comb would catch. Modern statutes tend to function like a fine watch with complex interlocking gears, in which a minor flaw in one can have potentially drastic consequences for the whole.[234] As discussed above, the nature of both the drafting process and lawmakers' resources means it is nearly impossible to perform a complex legalistic analysis of the entire statute. What is more, putting the burden on *all* lawmakers, as opposed to the horse traders, creates the possibility for devious legislators to place small textual "bombs" or poison pills inside the statute, which are difficult to catch but can do serious damage to the statutory scheme if they "explode."[235]

232. *See generally* Ryan D. Doerfler, *The Scrivener's Error*, 110 NW. U. L. REV. (forthcoming 2016). Doerfler persuasively argues that the Court's current doctrine toward drafting errors results in "systematic under-recognition" of such errors.

233. Castillo v. United States, 530 U.S. 120, 124 (2000) (unanimous on this point); *see also* United States v. Tinklenberg, 131 S. Ct. 2007, 2013 (2011) (decision to read statute in light of structure and purpose joined by Justices Breyer, Kennedy, Ginsburg, Alito, and Sotomayor); Hall v. United States, 132 S. Ct. 1882, 1891 (2012) (decision privileging statute's "plain language, context, and structure" joined by Justices Sotomayor, Roberts, Scalia, Thomas, and Alito); Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 558 (2005) (decision of Justices Kennedy, Rehnquist, Scalia, Souter, and Thomas describing "ordinary principles of statutory construction" to include "examin[ing] the statute's text in light of context, structure, and related statutory provisions").

234. A similar metaphor was made by Justice Scalia in *McQuiggin*, though to the opposite effect. McQuiggin v. Perkins, 133 S. Ct. 1924, 1939 (2013) (Scalia, J., dissenting) ("[T]he intricate craftsmanship (of a statute) tells us that the designer arranged things just as he wanted them.").

235. Consider the stimulus law passed in 2009 by Congress in the wake of the 2008 financial crisis. Original versions of the bill placed sharp limits on bonuses that could be paid to executives at companies received stimulus money. At the time, such bonuses were enormously controversial. But the final language of the bill was apparently altered to create a loophole for companies like AIG, which was widely viewed as one of the biggest culprits in the crisis. The loophole was added by a single lawmaker, Connecticut Senator Chris Dodd, as part of a last-

By contrast, placing the burden of clarity on the horse traders does not necessarily prevent lawmakers from inserting language into a large statute that will not be caught by his or her peers.[236] But it does make such additions easier to catch if the horse-trading must either be written clearly or disclosed to the public.

B. Viability of (Moderate) Purposivism

The final question this Article will consider is how courts should respond when confronted with a likely drafting error that significantly undermines statutory coherence.

Professor Mark Seidenfeld recently coined the term "legislative process failure" to refer to a situation "in which the best reading of the words of the statute, using tools and the mechanism on which textualists rely, is unlikely to derive the understanding of the statute to which most legislators ascribed, or for issues on which legislators were likely to have single-peaked preferences, the understanding of the median legislator."[237] He argues that such "process failure generally warrants courts accommodating the legislative mechanism for ascribing meaning to statutes by considering legislative intent, which may counsel consideration of legislative history."[238] It is no doubt true that legislative history may be helpful where the plain language and the policy context conflict, as in *Sigmon*, where the congressional record included explanations of two of the Senators sponsoring the Coal Act, supporting the commonsense notion that successors of interests of signatory operators also had obligations to retired coal works, just as successors to "related persons" did.[239]

But such extratextual indications of intent might not always be available. In *King*, for example, the government could not point to specific

minute "backroom" deal that apparently some lawmakers who voted for the massive bill were unaware of. Alexander Lane, *Dodd flip-flopped on whether he changed amendment on bonuses to AIG and banks*, TAMPA BAY TIMES: POLITIFACT (Mar. 23, 2009), http://www.politifact.com/truth-o-meter/statements/2009/mar/23/chris-dodd/Dodd-flip-flop-AIG-bonuses/.; Glenn Thrush, *Dodd: I worked on AIG provision*, POLITICO: ON CONGRESS BLOG (Mar. 18, 2009), http://www.politico.com/blogs/glennthrush/0309/On_second_thought_it_was_my_loophole.html #. As one senator put it, "[t]he president goes out and says this is not acceptable and then some backroom deal gets cut to let these things get paid out anyway." *See supra*. The particular provision in that case was direct and unambiguous, such that a court would be bound to enforce it regardless of statutory context, structure, or purpose. But the point is that it would be that much easier for a minority of lawmakers to purposefully insert subtle language (think "established by the State") that would be unlikely to be caught by the majority, in the hope that a court would interpret the statute in a highly literal manner.

236. See Dodd example described in note 233.

237. Mark Seidenfeld, *A Process Failure Theory of Statutory Interpretation*, 56 WM. & MARY L. REV. 467, 487 (2014) [hereinafter Seidenfeld, *Process Failure*].

238. *Id.* at 529.

239. Barnhart v. Sigmon Coal Co., 534 U.S. 438 at 466 (Stevens, J., dissenting).

statements in the legislative history or anywhere else to directly support its position that the phrase "Established by the State" was meant to include exchanges established by the federal government acting in the place of a state.[240] More fundamentally, it is not clear that the concept of a unified legislative "mechanism" for ascribing meaning to statutes is intelligible in situations where the official legislative materials do not address the interpretive issue directly. Seidenfeld's approach may have promise but requires further elucidation.

Rather than distinguishing between the judicial and legislative perspectives, a simpler and more traditional approach would be to consider any information probative of congressional intent, while treating the text as primary. In most cases, traditional interpretive tools, aided by common sense, will reveal whether the anomalous result of a plain text reading was more likely to have been intentional or inadvertent. There can be no precise standard for making this determination, but common factors are likely to include: the size and complexity of the statute, the degree to which the literal language speaks directly to the interpretive issue, whether the issue is one lawmakers would have likely considered during drafting, the degree to which a literal reading interferes with the statute's express objectives, and whether the anomaly is created by a single textual provision or by several provisions working in concert (the second circumstance appears more likely to go unnoticed by lawmakers). In general, two of the most helpful tools for answering this question will be statutory structure and context. Structure helps courts understand how the statute is supposed to function as a whole, and what purposes specific provisions are designed to play. Context, including policy context, illuminates how various parts of the statute are meant to interact to form the whole.

If a court determines that the anomalous results of a literal reading are likely due to inadvertence or mistake, it may then be appropriate for the court to play a gap-filling role to preserve the intent manifested by statutory structure and purposes. Yes, this is a form of purposivism, but it is purposivism as "last resort," which is narrowly and carefully circumscribed, and consistent with faithful agency. Modern political science—and common sense, again—tell us that there can be no unified intent of a large multi-member body like Congress, and this is a point frequently emphasized by textualists. But accepting this point as true does

240. *See generally* Brief for the Respondents, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114), http://sblog.s3.amazonaws.com/wp-content/uploads/2015/01/14-114-Respondents-Brief.pdf. *But see* Mark Seidenfeld, *Tax Credits on Federally Created Exchanges: Lessons from a Legislative Process Failure Theory of Statutory Interpretation*, 99 MINN. L. REV. 101, 127–28 (2014) (arguing that the common legislative understanding that insurance purchased on federally established exchanges would be eligible for subsidies is evident from the very silence of the legislative history on this issue).

not gainsay permitting courts to posit a fictional congressional intent in cases where the statutory context indicates a *lack* of intent as to incoherent results, leaving a gap to fill. In this rare event, there may be no better answer than to make what Manning calls a "presumption of reasonableness and coherence."[241]

Manning quotes Judge Richard Posner as a sophisticated exemplar of this view.[242] In *Friedrich v. City of Chicago*, Judge Posner wrote:

> When a court can figure out what Congress probably was driving at and how its goal can be achieved, it is not usurpation—it is interpretation in a sense that has been orthodox since Aristotle—for the court to complete (not enlarge) the statute by reading it to bring about the end that the legislators would have specified had they thought about it more clearly or used a more perspicuous form of words.[243]

Posner's view does not imply that courts may simply rewrite a statute that speaks in language that is crystal clear. To do so would undermine the statute rather than "completing" it. Congress has the right to legislate to produce odd or awkward results. However, absent specific evidence that Congress intended such results, it may be unfaithful to congressional intent to presume compromise. Manning's primary response to Judge Posner's approach is that the BA forecloses it as a matter of constitutional interpretation.[244] If, however, as I have argued, the BA does not provide sufficient justification to support the maximalist position regarding hidden compromise, then perhaps something along the lines of this approach may still be regarded as both prudent and consistent with the Constitution.

There is not space in this Article to fully defend a moderate form of purposivism. There may be other, more functional arguments against this approach. But the takeaway is that textualists may have been too quick to believe that they have a constitutional trump card. The BA has been employed to demonstrate that a thoroughgoing textualist methodology is mandated by the Constitution. It this Article is correct, that claim has been overstated, and at a minimum, other interpretive methodologies, including forms of purpovisim, remain constitutionally viable.

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241. *See generally* Manning, *Competing Presumptions*, *supra* note 113, at 2024.

242. *Id.* at 2015–16.

243. Friedrich v. City of Chicago, 888 F.2d 511, 514 (7th Cir. 1989), *cert. granted and judgment vacated,* 499 U.S. 933 (1991).

244. *See* Manning, *Competing Presumptions*, *supra* note 113, at 2027–41.

Conclusion

Many of the recent debates over textualism have focused on the use of legislative history as an interpretive tool.[245] Even today, a disproportionate amount of scholarship critiquing textualism seems to focus on the legislative history question.[246] But in recent years the landscape has shifted, and legislative history is no longer the primary focus or foundation of "new textualism."[247] As Manning has written, "second-generation textualism relies less upon skeptical empirical claims about the (un)reliability of legislative history, and more upon conceptual claims about the crucial role of legislative compromise in our constitutional system and the consequences for interpretation that flow from such a conclusion."[248] In other words, second-generation textualism relies largely on the BA.

This Article has provided a critical analysis of the BA. My general conclusion is that while the argument supports the preservation of open compromise by adhering closely to the semantic meaning of statutes as written, it does not support the same approach with regard to hidden compromise, the existence of which is uncertain by definition. In light of this conclusion, I argued that some form of moderate and narrowly circumscribed purposivism remains a viable alternative, in cases where a court has reason to believe the anomalous results of a literal reading are the product of legislative inadvertence or mistake.

Although in many ways the gap between textualists and purposivists on the Supreme Court has narrowed,[249] *King* and other decisions demonstrate that fundamental differences remain. In particular, textualists and purposivists have different thresholds for when to consider a statute to be "clear," "plain," or "unambiguous," and what kinds of evidence should be considered to reach this conclusion. In light of these differences, it seems likely that textualist judges on the Supreme Court and elsewhere will continue to invoke some form of the Bargaining Argument to argue for a narrower and more literalistic reading of the text on the ground that it may contain compromise. There may be sound practical reasons for taking this

245. *See* Manning, *Second-Generation*, *supra* note 45, at 1289–90 (noting that first-generation textualism focused heavily on arguments concerning the reliability of legislative history).

246. *See, e.g.*, ROBERT A. KATZMANN, JUDGING STATUTES (New York, Oxford University Press 2014); Victoria Nourse, *The Constitution and Legislative History*, 17 U. PA. J. CONST. L. 313 (2014); Seidenfeld, *Process Failure*, *supra* note 235; Bressman & Gluck, *supra* note 115, at 741.

247. *See* Manning, *Second-Generation*, *supra* note 45, at 1290.

248. *Id.*

249. *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113 (2011).

approach, or there may not be. But, to the extent textualists argue that *the Constitution* compels courts to preserve hidden compromise to the maximum extent possible, I believe this argument will ultimately be found unpersuasive.

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